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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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No. _____

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS & ROCA

By John P. Frank
114 West Adams
Phoenix, Arizona 85003

RAYMOND C. SIMPSON
406 Security Bank Building
Long Beach, California 90802

Counsel for Petitioners

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THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Agua Caliente Band of Mission Indians, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 12, 1971.

Opinions Below

The opinion of the District Court (Appendix B to this petition) is reported at 306 F. Supp. 279 (C. D. Cal. 1969). The

opinion of the Court of Appeals (Appendix C to this petition) has not as yet been reported.

Jurisdiction

This is an action brought by an Indian tribe and Indian allottees to determine whether certain leases on Indian lands are subject to California state taxation by a California county. The complaint was filed on January 19, 1966, and the amended complaint on September 27, 1966. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1353 and 1362 and 25 U.S.C. § 349. On October 17, 1969, the trial court held that the leasehold interests on Indian trust land were taxable. The matter was appealed to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1291. On May 12, 1971, that court affirmed, District Judge Smith and Circuit Judge Wright making the majority, and Circuit Judge Ely dissenting. This Court has jurisdiction of this petition for certiorari under 28 U.S.C. § 1254(1).

Question Presented

Can a California county, acting under state law, validly impose a possessory interest tax upon leases of Indian trust land on an Indian reservation?

Constitutional Provisions, Statutes; Orders and Regulations Involved

The relevant constitutional provisions, statutes, orders and regulations are as follows:

1. U.S. Const. art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Mission Indian Relief Act of 1891, 26 Stat. 712, § 3:

"SEC. 3. That the commissioners, upon the completion of

their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever:"

3. Executive Order of President Taft allocating land to the Agua Caliente Tribe, Jan. 5, 1911. The Executive Order is attached as Appendix A to this petition.

4. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix D.

Statement of the Case

The petitioners in this case are the Agua Caliente Band of Mission Indians, a group with a reservation established under the Mission Indian Relief Act of 1891 in and about Palm Springs, California, where they have been located since time immemorial. The Tribe and its members hold about 27,000 acres of land, of which 2,000 are Tribal land and 25,000 are individual allotments. Of this total amount, the Tribe has leased precisely 8 of its 2,000 acres and the individuals have leased about 1,250 of the remaining acres, so that something under 5 percent of the total reservation land is generating income.

Ironically, these Indians are thought to be wealthy. The fact is that they are "land rich and dollar poor" (T. 175), because they cannot freely sell their land. They are economically not capable of using it themselves except as they may lease it, and only a little is leased.

California has a possessory interest tax (see opinion of court below, Appendix C, n.2) which does not purport to tax the land of the Indians but it does tax the "full cash value" of the lessee's interest in it. On a long-term lease, this amounts economically to the same thing (T. 234). As a general matter, this tax runs to some 2-¼ percent of the appraised value of the land (T. 211).

In 1958, the Tribe gave a long-term lease to the operators of the Palm Springs Spa which was duly approved by the Secretary of the Interior. Indian leases had been made for many years, and without taxation. As the court below said, when these leases were executed no one supposed that the lessees would be required to pay any taxes by reason of their use of the Indian property. However in 1960 the state did assert a claim for the possessory interest tax.

This litigation followed. The fundamental question was the validity of the tax from various standpoints. A full trial was had, and evidence was taken. That evidence showed conclusively both to the trial court and to the Court of Appeals that the practical effect of the tax landed squarely on the Indians. As a result of it, the Tribe and the Indians got less rent and lost their bargaining position; as the court below said of the Indian, "the tax has an adverse economic effect upon him."

This is true although the tax is paid by the lessee, not by the Tribe or the allottee; Riverside County duly gets a check, and the signature is not an Indian's. But by the uncontradicted and complete evidence, the money comes from the Indians all the same. Moreover, the existence of the tax chills leasing and makes it difficult.

1. The hotel lease is the only lease the Tribe has. The priority of the tax put the hotel far in arrears to the Tribe on its rent.

2. An independent real estate developer testified that he had negotiated three leases on Tribal land, all on the assumption that they would be tax exempt. As a practical matter, the tax "made

it impossible for us" (T. 140) and all leases were forfeited. On other property, county taxes totaling $150,000 made it impossible for the lessee to pay the rent to the Indians (T. 89-93).

3. All these leases must be approved by the Bureau of Indian Affairs. Witnesses from the Bureau testified that the practical effect of the application of the tax is to push down the rent to the Indians by approximately 2 points, or from 20 to 25 percent of value. That is to say, leases are figured on a percentage basis at a 6 to 10 percent range depending on all the factors to be taken into account, and 2 of those points come off where there are taxes. This was confirmed by the testimony of the leading appraiser of Southern California who testified that as a practical matter the Indians "will then have to absorb the additional tax burden" (T. 219). The Bureau also confirmed that some lessees have not been able to keep their leases because of the taxes (T. 100-09).

4. The tax has diminished the leasing. Testimony from responsible witnesses was that unless lessees receive some advantage from dealing with the Indians, they would rather take their business elsewhere to avoid dealing with the Bureau of Indian Affairs. This is not an impled criticism of the Bureau. It is simply a fact of life that Indian arrangements are clumsier than private dealing. This is particularly true because the normal method of putting a major development onto leased lands is to make a lease, and then borrow mortgage money for construction. To do this, the land must be subordinated to the mortgage. But the Indian land can only be subordinated on the authority of orders from the farthest reaches of the Interior Department, which are rarely made (T. 205-06).

The net effect has been radically to reduce Indian leasing. As the area director for the Bureau of Indian Affairs said, "What happened was that benefits which we thought the Indians were entitled to were pretty well washed out." (T. 31). Some long-term leases have been executed since 1961 (T. 190), of which at least one expressly provides diminution of rentals by the amount of the

tax (T. 188-89). As has been noted, only 8 of the approximately 2,000 Tribal acres are leased, and Mr. Homer B. Jenkins, the assistant to the Area Director of the Bureau with direct responsibility for the Palm Springs area, testified that there was Indian property left to be developed "if we can get over this hurdle [the tax] for the Indian properties." (T. 188).*

The majority below, with what we read as evident reluctance, held that it must blindfold its eyes to the fact that this tax is for all economic purposes a tax on the Indians' land. It thought that the result was required by the decision of this Court in *United States v. City of Detroit*, 355 U. S. 466, 78 S. Ct. 474, 2 L. Ed 2d 424 (1958). That case upheld a Michigan possessory interest tax on land leased from the United States. Judge Ely, dissenting, saw the distinctions pressed by the Tribe between a tax the burden of which falls on the United States and a tax the burden of which falls on an Indian Tribe; and he also found the Indian trust lands to be in a different position than the federal lands.

Reasons for Granting the Writ

1. We respectfully submit that this is probably the most important Indian case of recent years. The clear policy of the United States is to help Indians help themselves. About all that the Indians have is such land as they have been able to reserve. Except as they can lease it, they don't have much. As this record solidly shows, the California policy severely inhibits the merchandising of their one asset. This is far more than a matter of the revenue from the leased land for the lease commonly gives an opportunity for employment of Indians by the lessee. Both the revenue and the opportunity are cut off by this tax.

We shall leave it to the Tribes to speak for themselves, being aware that they may be expected to be heard from amicus. It can

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*The foregoing accurately states the record. In Palm Springs there is still only one Tribal lease. Since October, 1969 (the judgment date), there have been 17 individual leases, but at lower rental to compensate for the tax.

reasonably be expected that if this tax is upheld, it will be applied universally. To await further decisions on this subject is to court years of degradation and poverty.*

2. The decision below misapplies *United States v. City of Detroit, supra,* and *Oklahoma Tax Comm'n v. Texas Co.,* 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 2d 721 (1949). In the *Detroit* case, the burden on the federal government was trifling. Here there is the utmost interference with the leasing function of the Tribe. We are dealing with more than "merely hypothetical interferences with governmental functions here asserted to sustain exemption," *Oklahoma Tax Comm'm v. Texas Co., supra.*

The court below applies the *Oklahoma Tax Comm'n* case to this situation. There the court upheld a per barrel tax on oil extraction by lessees of Indian lands. The oil extracted belonged entirely to the oil company and the tax is simply a kind of gross income tax on extractions, expressly noted by the Court to be minor in its consequence. In the instant case, we have nothing but a thinly disguised property tax, major in its consequences. Moreover, as the dissenting judge below stressed, that case expressly rested upon the fact that, "There is no possibility that

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*To counter the impression that somehow all this is to be borne because it is assumed that the Palm Springs Indians are exceptionally wealthy, we put into the record the experience of the Fort Mojave Indians, who are among the most poverty-stricken residents of North America. These residents live in a one-time Japanese relocation camp near Needles, California, in 20 by 28 foot hovels (T. 154-55), with as many as 16 occupants in a home, with no fire or police protection. This Tribe had been able to negotiate but one lease, and that lease was all that stood between them and the most appalling destitution. See Affidavit of Barrackman, and testimony of Barrackman at T. 146, *et seq.* From their lessee they received two payments of $50,000, which were the first substantial revenue the Tribe ever had from anybody in connection with its land (T. 159). The lessee then abandoned the lease (T. 160). Thereafter, a new lease was made, but at a revenue of $50,000 less for the first two years than would have been the case if the first lease had continued (T. 164). [Since the trial the Fort Mojaves have obtained one lease on their Arizona land, where there is no possessory interest tax, and none on their California land.]

ultimate liability for the taxes may fall upon the owner of the land." Here both courts below expressly accept the clear thrust of the evidence which is that the load falls squarely on the Indians.

3. *Detroit* is independently distinguishable. Only the federal government can regulate commerce with the Indian Tribes (U. S. Const. art. I, § 8); the power is "exclusive and unfettered," *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846 (1876), and this includes commerce with the individuals who compose the Tribe, *United States v. Holliday*, 70 U. S. (3 Wall.) 407, 417, 18 L. Ed. 182 (1866). As the record shows, this tax directly diminishes the most valuable commerce the Indians have with the white world.

Moreover, the Indians have their own sovereignty, and are distinct, independent political communities in which the laws of a state could have no force and effect, *Williams v. Lee*, 358 U. S. 217, 219, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). State law may not be applied where it interferes with reservation self-government, *Organized Village v. Egan*, 369 U. S. 60, 67-68, 75, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). Here the Tribe has its own taxes; economically the two systems cannot stand together.

Both the commerce and sovereignty factors distinguish *Detroit* from the instant case.

4. The decision below conflicts with the trust status of these lands and the decisions interpreting and applying that trust status. These lands are in tax-exempt trust. Such a trust could protect Indian lands from only one possible source of danger: taxing governments. This protection afforded Indian lands gives an economic advantage to the Indian. That advantage has been recognized as a vested property right. See *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941 (1912), expressly recognizing "vested rights of exemptions from state taxation" as a consequence of the trust. In *Choate v. Trapp*, the State argued that the tax exemption "was only intended to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private

contract. In other words, it is said that the tax exemption was only an additional prohibition against a sale, . . ." 224 U. S. at 672. The Court expressly held that the exemption and the non-alienability of the land were "two separate and distinct subjects." The exemption, it said, conferred a property right fully vested in the Indians. *Id.*

The County seeks to profit from a verbal distinction between a tax on the land and a tax on the use of the land, conceding the immunity of the one, and claiming the taxability of the other. This is plain word-chopping, but it should not be successful even at that for this is at root a tax upon trust interests, and the trust itself is a federal instrumentality which cannot be taxed. The best discussion is *United States v. Rickert,* 188 U. S. 432, 437-38, 23 S. Ct. 478, 47 L. Ed. 532 (1903), a passage too long to quote as extensively as it deserves, and we incorporate it by reference. That case also deals with trust lands and the taxability of personal property on them. The Court turns to the function of the trust and of the tax. As it says, "[t]o tax these lands is to tax an instrumentality employed by the United States. . . ." It says that if the tax is allowed, "then the obligations which the government has assumed in reference to these Indians may be entirely defeated." It stresses that at the end of the trust, just as here, the lands must pass to the Indians, "free of all charge or encumbrance whatsoever." As it holds, if taxes are outstanding, the lands are not "free from encumbrance."

The Mission Indian Relief Act of 1891, 26 Stat. 712, did expressly provide that these lands were to be held "in trust for the sole use and benefit" of the Indian.*

*The Executive Orders allocating the land to the Tribe, Ex. 13, were given under the Act of 1891 "in trust for the sole use and benefit of the said Agua Caliente Band," to be conveyed at the end of the trust period "free of all charge or encumbrance whatsoever." Order of President Taft, Jan. 5, 1911. (Appendix A). The chain of extensions of the trust is discussed by representatives of the Bureau of Indian Affairs in the record at T. 72; T. 182-83; and *see* 25 C.F.R. Appendix pp. 418-21. The testimony refers to certain executive orders. That of April 30, 1921, Exec. Order No.

As applied to the trust lands, the decision below is out of accord with *Squire v. Capoeman*, 351 U. S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956). In this case the question was whether the Indian occupant of trust lands must pay a capital gains tax when he sold timber from his land. The government asserted that this was merely a tax on income and not a tax on the land held in trust for the taxpayer. The Court held that the imposition of the tax was incompatible with the provision of the trust that the land should be transferred "free of all charge or encumbrance whatsoever." The imposition of a capital gains tax was an encumbrance, for the trust was to be "free from all taxes" so long as it was in trust.* The Court held that "it is necessary to preserve the trust and income derived directly therefrom." This tax does not preserve the trust and it severely diminishes the income derived therefrom.

5. The tax interferes with existing federal regulations which have preempted the field. In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U. S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965), this Court held invalid the Arizona sales tax as applied to traders on the Navajo Indian Reservation. It concluded that, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U. S. at 690.

The same thing is true here.

The first Section of the General Leasing Act, 25 U.S.C. § 415,

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3446 extended the trust period for 10 years. Exec. Order No. 5580, March 16, 1931, extended it for an additional 10 years, and Exec. Order No. 8580, October 29, 1940, extended it for 25 years.

*In *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22, 26 (1967), *cert. denied*, 389 U. S. 1016 (1968), the Supreme Court of Washington read this Court in *Squire v. Capoeman* as concluding "that the words 'charge or encumbrance,' as they appear in the General Allotment Act of 1887, should be interpreted broadly, and any doubt should be resolved in favor of the Indians. . . ." It adopted as the definition of "encumbrance" any "burden upon land depreciative of its value. . . ." Justices Douglas and White dissented from the denial of certiorari in *Snohomish*, believing that "A substantial federal question is presented."

permits leases upon this as well as certain other reservations for up to 99 years with the "approval of the Secretary of the Interior." It is expressly provided that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." These regulations, 25 C.F.R. pt. 131, contain a comprehensive system of leases by which the leases are regulated to the decimal point. On this record the county's tax is a serious threat to the very existence of commercial leases carefully negotiated by the federal government for the benefit of its trust beneficiaries.

The leasing regulation must be read in conjunction with 25 C.F.R. § 1.4 (1969), the regulation of the Interior Department covering "state and local regulation of the use of Indian property." This section in express words precludes the operation of any state or local laws "controlling the use or development of any real or personal property" on the Indian trust lands. It is overwhelming on this record that this tax is regulating or, certainly, controlling the development of the Indian lands.

While, as the court below observed, the state does not claim the power to execute on the Indian lands if the taxes are not paid, it is clearly authorized by the statute to execute on the lease. It is expressly empowered to seize and sell possessory interests for unpaid taxes by sale at public auction with delivery of the property by payment, *Cal. Rev. & T. Code Ann.* §§ 107(b), 2914, 2917, 2918. This results in immediate possession, *Graciosa Oil Co. v. Santa Barbara County,* 155 Cal. 140, 99 P. 483 (1909).

The practical result would be possession and operation of property on Indian land in the teeth of careful Department regulations controlling admission to such activities, *see* 25 C.F.R., pt. 131.*

*On September 31, 1969, the County Tax Collector did seize a possessory interest of an Indian lessee from another Indian and the power to tax and collect on that parcel was upheld in a letter opinion of December 4, 1969, by the same county counsel who is our adversary in this case.

Conclusion

We respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted,

LEWIS & ROCA

By John P. Frank

RAYMOND C. SIMPSON

Counsel for Petitioners

August, 1971

Appendix A

Executive Order of President William H. Taft, January 5, 1911:

"The United States of America . . . does and will hold the said tracts of land selected as aforesaid — subject to all the restrictions and conditions contained in the said act of Congress of January 12, 1891 — for the period of twenty-five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Indians, according to the laws of California, and at the expiration of the said period the United States will convey the same or the remaining portion not patented to individuals, by patent to the said Agua Caliente Band or Village of Indians, as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

Appendix B

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of All Allottees of Allotted land on the Agua Caliente Band of Mission Indians Reservation,

Plaintiffs,

vs.

THE COUNTY OF RIVERSIDE, a political Subdivision of the State of California,

Defendant.

CIV. 66-108-R

United States District Court
C.D. California

October 17, 1969.

Action by American Indian tribe and allottees of allotted land on reservation against county to permanently enjoin assessment, levy and collection of possessory interest taxes and to recover damages. The District Court, Real, J., held that interest of non-Indian lessees in Indian lands was not immune under federal constitutional and statutory law from imposition of possessory interest taxes by county.

Judgment for defendant.

Raymond C. Simpson, Long Beach, Cal., for plaintiffs.

Ray T. Sullivan, Jr., County Counsel, Richard J. Lawrence, Deputy County Counsel, Steven A. Broiles, Deputy County Counsel, Riverside, Cal., for defendant.

Fort Mojave Indian Tribe, Needles, Cal., amicus curiae.

REAL, Distict Judge.

Plaintiff THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council (hereinafter referred to as AGUA CALIENTE) and plaintiffs DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTE, PATRICK PATENCIO and LAWRENCE PIERCE on their own behalf and as representative of all allottees of allotted land on the Agua Caliente Indian Reservation (hereinafter referred to as ALLOTTEES) bring this action against defendant COUNTY OF RIVERSIDE (hereinafter referred to as COUNTY) to permanently enjoin the assessment, levy and collection of possessory interest taxes and to recover damages.

Plaintiff AGUA CALIENTE is an American Indian Tribe recognized by the United States of America in the Mission Indian Relief Act of 1891[1] with its amendments and Public Law 86-339.[2] By the Mission Relief Act, as amended, ALLOTTEES were individually allotted certain of the lands of the Agua Caliente Indian Reservation. All other lands of the reservation are unallotted tribal lands held for the benefit of the plaintiff AGUA CALIENTE.[3] Both allotted and unallotted tribal lands are held by the

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[1] 26 Stat. 712, January 12, 1891.

[2] P.L. 86-339, Sept. 21, 1959, 73 Stat. 602-605, 25 U.S.C. §§ 951-960.

[3] 25 U.S.C. § 953

"§ 953. Lands — Determination of value of unallotted and allotted lands; exclusion of deceased allottees' allotments

(a) * * *

Lands not subject to allotment; distribution of revenues from mineral springs parcel,

United States, in trust, for plaintiffs ALLOTTEES and AGUA CALIENTE.

Plaintiffs jointly, in the aggregate, own 26,646.28 acres of land laid out in a checkerboard pattern in the area of Palm Springs, California. Of this aggregate, 24,640.45 acres are allotted to 103 individual ALLOTTEES each having commercial, irrigable and desert lands appraised at $335,000.

Since the property is held in trust by the United States, the land cannot be sold or encumbered without the approval of the

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(b) In no event shall the following tribal lands be subject to allotment, and they shall henceforth be set apart and designated as tribal reserves for the benefit and use of the band:

Cemetery numbered 1, block 235, section 14, township 4 south, range 4 east.

Cemetery numbered 2, as now constituted pursuant to secretarial order, comprising approximately two acres.

Roman Catholic Church, as now constituted pursuant to secretarial order, comprising approximately two acres.

Mineral Springs, lots 3a, 4a, 13, and 14, section 14, township 4 south, range 4 east: *Provided,* That no distribution to member of the band of the net rents, profits, and other revenues derived from that portion of these lands which is designated as "parcel B" in the supplement dated September 8, 1958, to the lease by and between the Agua Caliente Band of Mission Indians and Palm Springs Spa dated January 21, 1958, or of the net income derived from the investment of such net rents, profits, and other revenues or from the sale of said lands or of assets purchased with the net rents, profits, and other revenues aforesaid or with the net income from the investment thereof shall be made except to those enrolled members who are entitled to an equalization allotment or to a cash payment in satisfaction thereof under section 951-958 of this title or, in the case of such a member who died after September 21, 1959, to those entitled to participate in his estate, and any such distribution shall be per capita to living enrolled members and per stirpes to participants in the estate of a deceased member.

San Andreas Canyon, west half southeast quarter, southeast quarter southeast quarter section 3, township 5 south, range 4 east.

Palm Canyon, south half and south half north half section 14, township 5 south, range 4 east; all section 24, township 5 south, range 4 east.

Tahquitz Canyon, southwest quarter section 22, township 4 south, range 4 east; north half section 28, township 4 south, range 4 east.

Murray Canyon, east half section 10, township 5 south, range 4 east.

(c) * * *

(d) * * *"

Bureau of Indian Affairs. Leases have been approved and cover 8 acres of allotted land. 59 Indians participate in long-term leases and 116 Indians participate in short-term leases. These leases generate practically all of the income available to plaintiffs' ALLOTTEES and AGUA CALIENTE.

Negotiations for the lease which precipitates this action began in 1957 and in 1958 a lease was executed for the land upon which is situated a major hotel, Palm Springs Spa. This lease is the sole lease upon tribal lands covering 8 acres. Negotiations for the lease were predicated upon an 8% return on capital to plaintiff. Both parties executed the lease under the impression that the land was tax exempt and that the property would be tax exempt as to the lessee.

Commencing with the tax year 1960-61, defendant COUNTY began assessing and collecting possessory interest taxes which have been steadily increasing since then.

Plaintiffs claim herein that imposition of a possessory interest taxes upon the interest of non-Indian lessees in Indian lands is unlawful because of:

1. Article I, Section 8, Clause 3 of the Constitution of the United States of America;
2. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America;
3. P.L. 83-280, Aug. 15, 1953, 67 Stat. 589, 28 U.S.C. section 1360 and amendments thereto.

Defendant COUNTY supports its power to impose possessory interest taxes claiming authorization in 25 U.S.C. section 398c or 28 U.S.C. section 1360.

THE TAX INVOLVED AND ITS IMPACT

California Revenue and Taxation Code Section 107 provides in pertinent part:

"§ 107 Possessory interests; * * *

'Possessory interests' means the following:

(a) Possession of, claim to, or right to the possession of

land or improvements, except where coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

* * *"

The simple statement of the statutory provision for taxation of possessory interest describes two classes of property rights — (1) the aggregate of rights, duties, privileges and immunities accruing to an individual (or other legal entity) out of *possession* of an underlying fee interest in land or (2) improvements on an otherwise tax-exempt fee interest. We are not here concerned with the legal or beneficial ownership of the underlying fee interest in land. It is the possession of tax-exempt Indian lands owned by non-Indians. In other words, it is the property interest owned by the non-Indian that is the subject of this litigation and it is that property interest that defendant attempts to reach by its assessment, levy and collection of a possessory interest tax.

California Revenue and Taxation Code Section 107 provides only for the assessment, levy and collection of a tax from the owner of a possessory interest defined therein. Its impact—at least directly—in terms of the various interests considered here is upon the non-Indian lessee of tax-exempt Indian lands.

[1] Plaintiffs claim—through testimony of experts—that the defendant's tax must be paid by the Indian owners directly by rent adjustments or at least indirectly in considering negotiations for future leases by adjustment of their return upon valuation of their tax-exempt land. Assuming that the economic burden of this possessory interest tax falls eventually upon plaintiffs, it is not —for that reason—invalid. *United States v. City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424; *Alabama v. King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3; *Graves v. New York,* 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927; *James v. Dravo Contracting Co.,* 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155.

CLAIMS OF IMMUNITY

IMMUNITY UNDER THE COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the Constitution of the United States provides in its pertinent part:

"Section 8. The Congress shall have Power * * *;

* * * * * *

To regulate Commerce * * * with the Indian Tribes;"

[2] The nature of Congressional power in Indian matters is paramount and plenary. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483. But statement of the power does not end the inquiry. It must be ascertained that the activity or subject matter of the inquiry is "commerce."

Defendant herein asserts its taxing power against the property right of a non-Indian. It does not claim nor assert any right to tax the underlying fee interest of the Indian. "Commerce" is a broad term given broad meanings by the Supreme Court. *United States v. South Eastern Underwriter's Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440; *Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160. No decision has given to a property right created out of contractual relations the status of commerce.

[3, 4] Plaintiffs claim that Congress has pre-empted Indian affairs by its comprehensive provisions of Title 25 United States Code and its regulations comprising a full volume of 25 Code of Federal Regulations. Pre-emption can be no broader than the power — the power to regulate commerce. The subject matter of the tax herein is the property right of a non-Indian which — though it may have resulted from Indian commerce — is neither "commerce" nor a contemplation of commerce. The relationship is one of lessor-lessee providing for no more "trade" than the payment of rent for use of Indian lands.

IMMUNITY PURSUANT TO P.L. 83-280, AUG. 15, 1953, 67 STAT. 589, 28 U.S.C. SECTION 1360 AND AMENDMENTS THERETO

[5] Plaintiffs claim that defendant is precluded from taxing the possessory interest of non-Indian lessees on tax-exempt Indian lands because of 28 U.S.C. § 1360 [P.L. 83-280, Aug. 15, 1953, 67 Stat. 589].

Title 28 U.S.C. § 1360 provides in its pertinent part:

"(a) * * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property * * * belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * *."

This statute concedes tax immunity to real or personal property *belonging to an Indian* imposing the further condition that the property be held in trust by the United States or subject to some Federal restraint on alienation. The property right attempted to be taxed herein does not belong to an Indian but to a non-Indian.

Defendants conversely ground their jurisdictions over this property right in this very same section. Subsection (a) of § 1360 provides in pertinent part:

"(a) * * * those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."

California Revenue and Taxation Code Section 107 is a civil law of general application to private persons and private property and pursuant to 28 U.S.C. § 1360(a) has the same force and effect upon non-Indians within the Indian country as it has elsewhere within the State of California.

IMMUNITY BY REASON OF THE TRUST STATUS OF INDIAN LANDS

[6] The plight of the Indian in American History needs no articulation here. If despair has any meaning, its application to Indians in the late 19th century is an understatement. Somewhat out of a sense of guilt—but more hopefully out of a sense of justice—the Congress passed the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712) providing that the United States was to hold "in trust for the sole use and benefit" of the Indians certain lands, the subject of this action.

Plaintiffs maintain that the trust created by the Mission Indian Relief Act must reserve to the Indians an economic advantage which is being destroyed by the imposition of a possessory interest tax upon the non-Indian lessees. That argument can be sustained only with the sense of guilt approach. The history of this Republic chronicles a plethora of instances—both Indian and non-Indian—of the loss of vast land-holdings through the vicissitudes of mortgage foreclosures and tax-sales. The purpose of the trust created is to assure the beneficiary of an estate "free of all charge or incumbrance whatsoever."

[7] Plaintiffs make much of the value of the immunity of their trust lands from taxation. They discuss it in terms of a vested property right—and it is so held in *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941. But property only has "value"—in the sense propounded by plaintiffs' experts—if it can be sold or otherwise alienated for a valuable consideration. But here plaintiffs cannot—by conveyance of the fee upon termination of the trust status—transfer any tax immunity or tax exemption. The economic advantage or value of the tax immunity is one that can be exploited solely by the Indian and then only during the trust period.

[8] The economic effect upon the so-called economic advantage created by the trust is greatly exaggerated because the tax complained of by these plaintiffs is substantial. The amount of

the tax does not determine its validity. Here the tax is substantial because the property interest taxed is substantial. A possessory interest in a leasehold of 99 years is tantamount to an estate in fee for assessment purposes. *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546, 290 P.2d 544; *County of Riverside v. Palm-Ramon Development Co.*, 63 Cal.2d 534, 47 Cal.Rptr. 377, 407 P.2d 289.

A finding of validity of a possessory interest tax in this situation is compelled by *United States v. Detroit* (supra), where the Supreme Court held a possessory interest tax valid where imposed upon the use of tax-exempt real property leased from the United States by a private person. Plaintiffs would have the Court read the *Detroit case* (supra) only to give standing to plaintiffs to prosecute this action. Although sufficient authority for that contention, it would disregard the clear import of the case to deny its application to the tax here because Indians are involved. A trustor can grant no greater property than he owns. If the Government could not prevail in the *Detroit* case (supra) its wards and beneficiaries cannot prevail here.

Detroit (supra) gives a simple answer to all of plaintiffs arguments when the Court says at page 472 of 355 U.S. at pages 477-478 of 78 S.Ct.:

> "* * * [H]ere we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'.
>
> It is undoubtedly true, as the government points out that it will not be able to secure as high rentals if lessees are taxed for using its propetty. But * * *, the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax."

That Congress could have extended the tax immunity to plaintiffs' lessees is no answer. Without deciding whether it could or not the simple fact is it did not.

See also: *Oklahoma Tax Commission v. Texas Co.*, 336 U.S.

342, 69 S.Ct. 561, 93 L.Ed. 721; *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740.

IMMUNITY BECAUSE OF SOVEREIGNTY OF INDIAN TRIBES

[9] Plaintiffs claim that as a sovereign they have imposed a tax and defendant's tax is therefore double taxation. This tribal tax was first imposed in September 1967. Without deciding the validity of the tribal tax, it appears that its enactment was more in aid of litigation than any serious attempt to raise revenue for tribal operations.

In any event the question of sovereignty is well answered in *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 and needs no further articulation here.

JURISDICTION

[10] The jurisdiction of this Court to hear this matter is found in Title 28 U.S.C. section 1362. Plaintiffs have standing to bring this action to determine application of the provisions of California Revenue and Taxation Code Section 107 to property claimed immune under Federal Constitutional and statutory law. Cf. *United States v. City of Detroit* (supra).

Plaintiffs press on the Court *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883; *Snohomish County v. Seattle Disposal Company*, 70 Wash.2d 668, 425 P.2d 22; *Your Food Stores Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950; and *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165; as dispositive of the issues presented herein. Reading those cases makes them each distinguishable. *Squire* (supra) involves proceeds of Indian property in the hands of an Indian— *Warren Trading Post Company* (supra) and *Your Food Stores Inc.* (supra) concern what is unmistakenably Indian commerce in its classic sense and *Snohomish County* (supra) is a consideration of encumbrances upon the *use* of Indian land.

This memorandum opinion shall serve as findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure Rule 52(a).

Judgment shall accordingly be for defendant and the Clerk is instructed to so enter it.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of All Allottees of Allotted land on the Agua Caliente Band of Mission Indians Reservation, *Appellants,* vs. THE COUNTY OF RIVERSIDE, a political Subdivision of the State of California, *Appellee.*	No. 25,298

[May 12, 1971]

Appeal from the United States District Court
for the Central District of California

Before: ELY and WRIGHT, Circuit Judges, and SMITH,* District Judge.

The Agua Caliente Band of Mission Indians (hereafter The Band),[1] together with individual members of the Band (here-

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

[1]See 26 Stat. 712, January 12, 1891, 73 Stat. 602, 25 U.S.C. Sections 951-960 (1959).

after the Allottees) appeal from a judgment of the District Court refusing to enjoin the imposition of the California Possessory Interest Tax[2] on the lessees of the Indian land.

The Secretary of the Interior, acting under Congressional authority,[3] allotted to the individual members of The Band and to The Band itself a total of 26,646.28 acres in the area of Palm Springs, California. These lands are interspersed among non-Indian lands in a checkerboard pattern. The legal title to them is in the United States in trust. Of these lands 1250 acres, including eight acres owned by The Band, are under long term leases, made as authorized by 25 U.S.C. Section 415 by the Allottees and The Band with the approval of the Secretary of the Interior. At the time the leases were executed all parties contemplated that the lessees would not be required to pay any taxes by reason of their use and possession of the Indian property.

Jurisdiction as to the claims of the Allottees is found in 28 U.S.C. Section 1331; and as to The Band in 28 U.S.C. Section 1331 and

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[2]" 'Possessory interest' means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land. Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 and 2919, inclusive, at any time within three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof." California Revenue and Taxation Code, Section 107.

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[3]See footnote 1, *supra*.

Section 1362, unless, as defendants claim, the court is deprived of jurisdiction by 28 U.S.C., Section 1341, which reads: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This section has been held to be inapplicable to cases involving taxation of instrumentalities of the United States, at least in cases where the United States is a party.[4] Indian property uniformly is said to be an instrumentality of the United States.

> "Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from State taxation is the Federal Instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a Federal function, and that a State cannot impose a tax which will substantially impede or burden the functioning of the Federal Government." Federal Indian Law, Dept. of Int., 1958, page 846.[5]

At the instance of the United States, as trustee, State laws taxing Indian property may be contested in the Federal District Court. An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests.[6] The reasons given in *United States v. Livingston, supra,* for exempting instrumentalities

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[4] *Department of Employment, et al. v. United States, et al.*, 385 U.S. 355 (1966), *United States v. Livingston*, 179 F.Supp. 9 (E.D.S.C. 1959), affirmed without opinion 364 U.S. 281 (1960). It is to be noted that in one of these cases a public corporation was a co-plaintiff with the United States, and that in the other a private corporation was a co-plaintiff with the United States.

[5] Cited in support: *United States v. Rickert*, 188 U.S. 432 (1903); *United States v. Pearson*, 231 Fed. 270 (1916); *Dewey County, S.D. v. United States*, 26 F.2d 434 (1928), *cert. den.* 278 U.S. 649 (1928); *United States v. Thurston County*, 143 Fed. 287 (1906); *United States v. Wright*, 53 F.2d 300 (1931), *cert. den.* 285 U.S. 530; *Morrow v. United States*, 243 Fed. 854 (1917).

[6] *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968).

of the United States from the operation of 28 U.S.C. Section 1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with the United States. We conclude that the District Court did have jurisdiction.

The California tax on possessory interests does not purport to tax the land as such, but rather taxes the "full cash value" of the lessee's interest in it.[7] Upon default in payment of the tax the Indian lessor is not liable for payment of it and the Indian's title to the land is not encumbered.[8]

A substantial amount of evidence was received bearing upon the economic effects of the tax upon the Indian. We conclude from it what we would conclude without it, that it, [sic] a lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him.

States may not without the consent of Congress tax the property of the United States,[9] nor may they tax instrumentalities of the United States.[10]

If the Indian as a beneficial owner of the land, the legal title to which is in the United States, is entitled to no more protection than the United States itself would enjoy, absent a congressional action forbidding the tax, then it is clear that the tax here imposed is valid. In *United States v. City of Detroit, supra,* (fn. 9) it was held that a tax similar to the California Possessory Interest tax could be levied upon a lessee holding land under a lease from the federal government even though the burden of the tax fell directly

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[7]*County of Riverside v. Palm Ramon Development Co.*, 63 Cal. 2d 534, 47 Cal. Rptr. 377, 407 P.2d 289 (1965).

[8]Cal. Rev. and Taxation Code, Sections 2914-2919, 3003, 3101-3107.

[9]*United States v. City of Detroit*, 355 U.S. 466 (1958).

[10]See cases cited in footnotes 4 and 5.

upon the United States. If it was not clear before, it is clear since *United States v. City of Detroit, supra,* that "the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax" and that the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself. We conclude from this that the tax here is properly imposed unless it can be said that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it.

Here, as in *United States v. City of Detroit, supra,* there is no statute which expressly forbids the imposition of a state use tax. The statutory law mentioning the taxation of these lands is found in an equalization act[11] and in a statute granting some measure of regulatory power to local governments.[12] If, as was said in *United States v. City of Detroit, supra,* a tax upon the use of property is

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[11]Public Law 86-339, Sept. 21, 1959, 73 Stat. 602, Sec. 5

"(a) The right to an equalization allotment or to a cash payment in lieu thereof pursuant to section 3, subsection (d), of this Act, shall be transferable by will or descent in the same manner as are trust payments under existing law and shall not be subject to State or Federal inheritance, estate, legacy, or succession taxes.

(b) A cash payment made in lieu of an equalization allotment pursuant to section 3, subsection (d) of this Act shall not be regarded as income or capital gain for purposes of Federal or State income taxation and shall not, as long as it remains in the form of cash or a bank deposit in the ownership of the allottee, be subject to taxation as personal property."

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[12]U.S.C. Section 1360. "(b) Nothing in this section (the one granting the regulatory power) shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

not a tax upon the property itself, then there is nothing in these statutes which expressly forbids the tax here imposed.

It remains however to determine whether from other legislation dealing with Indians and Indian land a purpose to exempt these allotments from the kind of a tax herein imposed may be found. The law initially authorizing the allotments[13] provides that the land shall be held in trust for the "sole use and benefit" of The Band or Allottees and that at the expiration of the trust period the land shall be transferred "free of all charge and encumbrance whatsoever." This language is identical with the language used in the general allotment Act[14] and in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949) the Supreme Court refused to imply a tax exemption on the basis of that language. The general rule that tax exemptions are not granted by implication is applicable to taxing acts affecting Indians as it is to all others.[15]

The position urged by the Indians here was fully supported by *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) wherein Mr. Justice Holmes said "A tax on the leases was a tax upon the power to make them and could be used to destroy the power to make them" and "the same considerations that invalidate a tax upon the leases invalidate a tax upon the profit of the leases, and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." That position however was specifically rejected in *Oklahoma v. Texas Company, supra*, and it is now untenable.

Appellants and *amicus curiae* press upon us the economic plight

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[13] 26 Stat. 712 (1891).

[14] 25 U.S.C. Section 348.

[15] *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). *Squire v. Capoeman*, 351 U.S. 1 (1956) may point to, although it does not express, a different rule where the taxing power of the United States comes in conflict with the interest of the ward.

of the Indians and persuasively attack the concept that a tax upon the use of a thing is not a tax upon the thing itself, but as we see it these arguments are foreclosed by the decisions cited.[16]

The judgment appealed from is affirmed.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The obligation of the federal government to its Indian wards, probably born of a collective national guilt, runs deep. It is federal policy, undeniable, if belated, that the Indian has a special status in our Country and that he is justly entitled to very special protection. I cannot join in stripping such a protection from the Agua Caliente Band in the face of the overwhelming evidence that the tax in question amounts, in its effect, to taxation of the full value of Indian trust lands.

It is conceded by all concerned that were Riverside County's possessory interest tax imposed directly on the Indian lands, it would be unlawful. My Brothers, however, feel constrained by *United States v. Detroit*, 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 (1958), to hold that "the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself." They conclude the tax to have been validly imposed absent legislative immunization. They further rely upon *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L. Ed. 721, 69 S. Ct. 561 (1949), to conclude that no such legislative immunization may be implied. I strongly disagree with both conclusions.

Detroit simply expressed the view, with which I have no disagreement, that the doctrine of intergovernmental immunity does not preclude state taxation of an entity *solely* because the burden of such taxation eventually falls on the federal government. If, however, an important federal policy conflicts with the goal of

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[16]California has made no attempt to seize and sell the interest of the lessees in any of the property involved in this action, and it is unnecessary here to touch upon the problem which would be created were the State of California, by some process of seizure and sale, to endeavor to substitute in an Indian lease a new lessee in the absence of the consent of the Indians and of the Secretary.

effective implementation of the state taxing power, I should think that the Supremacy Clause demands that the extent to which a state tax burdens the federal policy be an important factor in determining the validity of the tax. There was no such conflict in *Detroit*. Here, I submit, the conflict is unmistakable, and the burden onerous.

Moreover, even if the majority has correctly interpreted *Detroit*, the local tax here involved was illegal. The Agua Caliente lands were given "for the sole use and benefit" of the Band, to be conveyed at the end of the trust period "free of all charge or encumbrance whatsoever." The land involved in *Oklahoma Tax Comm'n* was allotted pursuant to a statute containing the same language, and my Brothers construe the opinion in that case as a refusal to imply a tax exemption from the language. But this, I submit, is an incorrect reading of that case. The court in *Oklahoma Tax Comm'n* was addressing itself primarily to the constitutional status of lessees of government-owned lands, whether Indian trust or otherwise. The lessees in that case sought exemption as federal instrumentalities. "The respondents are 'private persons' who seek immunity 'for their property or gains because they are engaged in operations under a government contract or lease.'" 336 U.S. at 363. Since the Indian lessors bore no tax burden, direct or indirect, the lessees were precluded from urging a derivative immunity from the Indian grant. "These cases present no question concerning the immunity of the Indian-lands themselves from state taxation. *There is no possibility that ultimate liability for the taxes may fall upon the owner of the land.*" 336 U.S. at 353 (emphasis supplied). The statutory implication which was rejected in that case was not urged from the Indian grant, but from the fact of the lease itself. No derivative Indian rights were asserted by the non-Indian lessees, and no Indian was a party to the action. Indeed, the crucial language of the statute was not discussed, or even mentioned!

Underscoring the limited relevance of *Oklahoma Tax Comm'n*

is *Squire v. Capoeman*, 351 U.S. 1, 100 L. Ed. 883, 76 S.Ct. 611 (1956). There, the Supreme Court, fulfilling a "clear 'duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress[,] Minnesota v. Hitchcock, 185 U.S. 373, 402 (1902),'" actually did construe the "charge or encumbrance" language alleged to have been at issue in *Oklahoma Tax Comm'n.* Without reference to the *Oklahoma* case, the language was construed to include taxation.

The majority's footnote 15 gives inadequate expression to the force of *Squire*. The case did not turn on the difference between state and federal taxation of Indian trust lands. Rather, the case stands for the proposition that the federal policy of protecting Indian wards is superior even to the need to collect revenue for the maintenance of the federal government itself. Surely, we should afford no less protection when the interest of the Indian ward is in conflict with an interest of a state. Some of the States were likely no less responsible than the Nation for alleged depredations of Indian property sometimes said to have caused the creation of federal trust status in the first instance. *Cf.* Note, 42 S.Cal. L. Rev. 101, 110 n.42 (1969).

I would reverse.

Appendix D

Statutes and Regulations

1. 28 U.S.C. § 1360(b):

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

2. 25 U.S.C. § 415(a):

"§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

"(a) Any restricted lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania, Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque,

the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation; Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. . . ."

3. 25 C.F.R. § 1.4(a):

"§ 1.4 State and local regulation of the use of Indian property.

"(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."

4. Partial Table of Contents, 25 C.F.R., pt. 131:

[This regulation is too long to reproduce; for reference to particular sections, a portion of its Table of Contents follows:]

"PART 131 — LEASING AND PERMITTING

Sec.

131.1 Definitions.
131.2 Grants of leases by Secretary.
131.3 Grants of leases by owners or their representatives.
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October Term, 1971

No. 71 - 183

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Plaintiffs,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Defendant.

AMICUS CURIAE BRIEF ON BEHALF OF THE MESCALERO APACHE TRIBE, OF NEW MEXICO.

FETTINGER & BURROUGHS

By GEORGE E. FETTINGER
Post Office Drawer M
Alamogordo, New Mexico 88310
As Amicus Curiae.

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AMICUS CURIAE BRIEF ON BEHALF OF THE MESCALERO APACHE TRIBE, OF NEW MEXICO.

Pursuant to Rule 42(2) and the written consent of all parties hereto, the Mescalero Apache Tribe, of New Mexico, does hereby file this Brief as Amicus Curiae.

Interest of Amicus Curiae.

The Mescalero Apache Tribe is an Indian Tribe organized pursuant to federal legislation and functioning under Federal control. As in the case of other developing Tribes, the growth of the Mescalero Apache Tribe is geared to economic development of enterprises on and near Indian lands. These lands, held in trust by the United States for the Indian beneficiaries, must be developed and protected if the Indian people are to survive. The threat to stifle the progress of the Agua Caliente Band of Mission Indians by the State of California looms as a threat to the economic security and growth of the Mescalero Apache Tribe.

The steps to Indian economic development are plagued by state and local efforts to tax Indian interests. The harder the Indians work at developing self-reliance, the harder the efforts of the state and local governments to circumvent the sovereignty of the Tribe and tax these efforts. These taxes are a direct threat to the tools of economic progress, and such taxes can destroy the structure of Tribal sovereignty, for the Agua Calientes and for other Indian Tribes.

As an American Indian Tribe, the Mescalero Apaches accordingly have a vital interest in the present case.

Questions Presented.

The primary question presented here is whether Riverside County, a political subdivision of California, can impose a possessory interest tax on leases of land on an Indian reservation where the lands are held in trust by the United States of America as Trustee, for the sole use and benefit of the Indians?

ARGUMENT.

I.

The State of California has no Authority to Apply its Possessory Interest Tax to Indian Land Still Held in Trust by the United States.

A. Article I, Section 8, Clause 3 of the United States Constitution vests exclusive jurisdiction over Indian Tribes in the Federal Government.

The United States has controlled Indian relations through the powers established in the commerce clause, U. S. Constitution, Article I, Section 8, Clause 3. It is this regulatory power that was utilized for many years to pre-empt state control of liquor sales to Indians, on and off the reservation. *United States v. Holliday,* 70 U.S. 407, 18 L.-Ed. 182 (1866). This Court in *Holliday,* supra., held that any commerce with Indians was subject to regulation by Congress, and the locality or extent of traffic cannot effect the power. Just as liquor merchants could not circumvent the control of the commerce clause by moving their sales off the reservations, neither can the State of California circumvent federal control by calling the tax a tax on the possessory interest. For though the tax is not directly on the Indian, its result has a direct economic reflection on the Tribe. It was the resultant harm to Indian beneficiaries that caused this Court in *Holliday* to remove all liquor from the control of the states where it could influence Indians. Just as Congress previously extended federal control over all liquor on or near reservations to protect its beneficiaries whenever the interest of trade or commerce required, Congress has now extended its control over Indian economic efforts to the exclusion of state and local government. This control applies whether the economic effort is carried on directly by the Indian or through a lessee, as the result to the Tribe is the same.

Pertinent sections of United States Code, Title 25 indicate continued federal control in the tax area. 25 U.S.C., Section 1322(b) states in part:

> "Nothing in this section shall authorize the alienation, encumbrance or taxation of any real or personal property, . . . belonging to any Indian or Indian Tribe, . . . that is held in trust by the United States are subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, . . . the ownership or right to possession of such property or interest therein."

This and other code sections dealing with federal tax control have been implemented by 25 C.F.R., Section 1.4.

United States v. Rickert, 188 U.S. 432, 441, S.Ct. 478, 47 L.Ed. 532, 538 (1903), establishes certain basic concepts of Indian tax law, "But, as already said, no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." In one sentence, this Court has summed up a basic premise that must be applied to all Indian tax questions: That the United States has a trust duty to Indian Tribes and therefore will exclude the states from taxing the land and interest of the Indians.

A review of the case law, the federal statutes and regulations, all implementing the commerce clause, indicate the federal government has taken the question of taxation of Indian interests under

its jurisdiction and has precluded the state, under any taxing method, from taxing the Indian Tribes.

B. Control of Leasing of Indian Lands Has Been Pre-empted by the Federal Government.

Where the federal government has exercised its power over an area of Indian development, that area is withdrawn from state legislation. *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In *Warren Trading Post,* the State of Arizona was pre-empted from levying a sales tax on Indian traders on sales made to reservation Indians because of federal legislation and regulation. In footnote No. 18 the Court stated as follows:

> "Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because these activities take place on a reservation, but rather because Congress in the exercise of its power, granted in Article I, Section 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject. Cf. Surplus Trading Co. v. Cook, 281, U.S. 647, 651, 74 L.Ed 1091, 1094, 50 S.Ct. 455."

The amount of legislation concerning regulation of Indian traders is an insignificant portion of the federal legislation pertaining to Indian Tribes as set forth in United States Code, Title 25 and 25 C.F.R.

The federal control over leasing, as utilized in the present case, is of far greater control than that exercised in *Warren Trading Post v. Arizona Tax Commission,* supra. The requirements of 25 U.S.C. Section 415, 25 C.F.R. 131 and the requirements and control of the Bureau of Indian Affairs, all conclusively indicate that the federal government has taken full control of Indian leases. Such blanket control removes any state application of its taxing power.

II.

The Tribe is Exempt From Taxation Because it is a Federal Instrumentality.

Indian Tribes have been considered governmental instrumentalities for an extended period of time. Federal Indian Law, pp. 472-473, states that an Indian Tribe is an instrumentality and agency of the federal government. This is also the rule as stated in *United States v. Rickert,* 188 U.S. 432, 437-438, 23 S.Ct. 478, 47 L.Ed. 532, 536 (1903):

> "To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race with which this court has said that 'From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this

Court, whenever the question has arisen.' United States v. Kagama, 118 U.S. 378, 384, 30 L.Ed. 228, 231, 6 Sup. Ct. Rep. 1108, 1115."

25 C.F.R. 131 establishes regulations for the leasing of Tribal lands. These regulations were established to implement the duties of the trustee to the beneficiary. Under these regulations, the Tribe becomes the conduit, or instrumentality, in meeting the federal government's obligation to protect and develop the Indian Tribes. All details related to the development of the Indian land, by statute and regulation, must be approved by the federal government.

The Mission Indian Relief Act of 1891, 26 Stat. 712, provided that these lands were to be held "in trust for the sole use and benefit" of the Indian. We suggest that the government has chosen the Tribe as the instrumentality for development of these lands. By carrying out this governmental function, the Tribe has been selected as the instrumentality for meeting the obligation of the government to the Indian people. The control of this instrumentality can be seen by 25 U.S.C. 415 and 25 C.F.R. 131. The selection of the Tribe to carry out this function to promote the economic development of the Tribe cannot expose it to state control. Whether by Bureau of Indian Affairs control or Tribal control, the leasing of Indian lands is performing a government duty and the Indian Tribe constitutes a federal instrumentality fulfilling that duty.

Conclusion.

Indian Tribes to survive must develop economically. Congress has recognized this need for economic development and through statute and regulation has established the various Tribes as federal instrumentalities to carry out its obligations to the American Indian. These needs of the American Indian have been met by utilizing the requirements of the commerce clause, federal statutes and regulations, all to the exemption of any state taxing authority.

Accordingly, the Mescalero Apache Tribe, as Amicus Curiae, respectfully requests that this Honorable Court grant the Agua Calientes' Petition for Certiorari.

Dated: September 1, 1971.

Respectfully submitted,

FETTINGER & BURROUGHS

By George E. Fettinger
Attorneys for Amicus Curiae,
The Mescalero Apache Tribe,
Post Office Drawer M
Alamogordo, New Mexico 88310

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Amici Curiae Brief on Behalf of The Fort Mojave Indian Tribe, of Arizona, California and Nevada; The Southern Ute Tribe, of Colorado; The Confederated Tribes of the Colville Reservation of, Washington; The Quechan Indian Tribe of the Fort Yuma Reservation, of Arizona and California; The Makah Indian Tribe of the Makah Indian Reservation, of Washington; The Cabazon Band of Mission Indians, of California; The Lummi Indian Tribe of the Lummi Reservation, of Washington; The Yavapai Prescott Community Association, of Arizona.

INDIAN AMICI CURIAE,
c/o 110 Pine Avenue, Suite 406,
Long Beach, Calif. 90802,
(213) 435-8303,

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Counsel for all parties have consented, in writing, to the filing of Amicus Curiae Briefs in the above entitled case on behalf of the following named American Indian Tribes in support of the Agua Caliente Indians Petition for Certiorari, to wit:

The Fort Mojave Indian Tribe, of Arizona, California, and Nevada;

The Southern Ute Tribe, of Colorado;

The Confederated Tribes of the Colville Reservation, of Washington;

The Quechan Indian Tribe of the Fort Yuma Reservation, of Arizona and California;

The Makah Indian Tribe of the Makah Indian Reservation, of Washington;

The Cabazon Band of Mission Indians, of California;

The Lummi Indian Tribe of the Lummi Reservation, of Washington;

The Yavapai Prescott Community Association, of Arizona.

Interest of Amici Curiae.

It is the considered opinion and belief of all Amici named herein that the case at bar is of such importance and significance as to be critical in its impact upon the future economy of all American Indian Tribes. All are tribes duly recognized by the Secretary of Interior. All possess lands held in trust by the United States of America as their Trustee, for the sole use and benefit of the Indian beneficiaries. The current economic status of most Indian Tribes is deplorable. Indeed, according to statistics compiled by the Bureau of Indian Affairs, the average median family income for all Arizona reservations, the State with the greatest number of Indians, amounts to only $1,357.00 annually; and approximately forty-nine (49%) percent of the Indian work force within the State is unemployed.

For people so immersed in poverty, a Possessory Interest Tax upon Lessees of their land, which obviously is ultimately passed on to the Indian, must have a direct

impact, and costly and adverse consequences. Both the Congress and the Federal Courts have historically and consistently attempted to protect the American Indians from illegal and unwarranted encroachment by the States and their political subdivisions, as the Indians pursue their way of life and attempt to precipitate economic development of their trust lands to their highest and best economic use. More specifically, the object of this consolidated Brief by the Amici named herein is to demonstrate that the Possessory Interest Tax imposed by the County of Riverside constitutes:

(1) A frustration of the trust responsibility of the United States;

(2) An illegal interference with the taxing power of an Indian Tribe.

Questions Presented.

The two fundamental questions presented by the case at bar are:

(1) May the States and their political Subdivisions effectively frustrate the trust responsibility of the United States to provide Indian beneficiaries with a fee simple title, free and clear of all encumbrances upon the expiration of the trust period, through the imposition of a Possessory Interest Tax upon Lessees of Indian Trust lands?

(2) May the States and their political Subdivisions illegally interfere with the taxing power of an Indian Tribe?

ARGUMENT.

I.

The United States Has a Duty to Convey a Fee Simple Title Free of All Charge or Encumbrance Whatsoever Upon the Expiration of the Trust Period.

A. If the County of Riverside Is Allowed to Impose a Possessory Interest Tax, the United States Will Not Be Able to Perform.

The United States Supreme Court, in the celebrated case of *Squire v. Capoeman,* 351 U.S. 1, 1100 Lawyers Edition 883 (1956), made an extensive analysis of the nature of the Indian trust involved in the case at bar. In so doing, they noted that the Congress of the United States, in providing for said Indian trust, had cautiously undertaken to protect it from any diminution in value during the trust period by expressly providing that upon expiration thereof a fee title shall be issued, free and clear of all charge or encumbrance whatsoever. In making a comprehensive comment upon why no tax should be permitted to stand, which would impair the Government's promise to transfer the fee "free of all charge or encumbrance whatsoever", the Supreme Court said:

> "The courts below held that imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee 'free of all charge or encumbrance whatsoever.' Although this statutory provision is not expressly couched in terms of nontaxability, this Court has said that
>
> > 'Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words

> of Chief Justice Marshall: "The language used in treaties with the Indians should never be construed to their prejudice. If words be made us of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."'
>
> *Worcester v. State of Georgia, 6 Pet. 515, 582; 8 L. Ed. 483.*"
>
> *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S. Ct. 121, 122, 75 L. Ed. 478.

Thus, the general words "charge or incumbrance" might well be sufficient to include taxation. But Congress, in an amendment to the General Allotment Act, gave additional force to respondent's position. Section 6 of that Act was amended to include a proviso—

> 'That the Secretary of the Interior, may in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and the reafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. * * *'

"The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. The fact that this

amendment antedated the federal income tax by 10 years also seems irrelevant. The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted."

"The wisdom of the congressional exemption from tax embodied in Section 6 of the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which the cutting is made. Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be 'at least, a sorry breach of faith with these Indians.' "

Certainly, if the Supreme Court of the United States has seen fit to restrict the Federal Government from imposing any kind of tax whatsoever respecting Indian trust land before the expiration of the trust period, it would logically follow that the States and their political subdivisions must also operate under the same prohibition. In other words, if the Federal Government has a duty to convey a fee simple title, free of all charge or encumbrance upon the expiration of the trust period, which precludes the imposition of "all taxes" during the trust period, then the County of Riverside must also abstain because any action to the contrary would preclude total performance by the United States as Trustee for the Indians. Furthermore, since Riverside County is prohibited from imposing any direct taxation upon said Indian trust it must also be prevented from imposing a Possessory Interest Tax, which is nothing more than doing indirectly that which they are prohibited from doing directly.

B. State Supreme Courts Have Recognized the Trust Duty of the United States to Control Indian Trust Lands.

While the United States Supreme Court has never directly ruled that a state may not impose a possessory interest tax upon lessees of Indian land held in trust by the Federal Government, State Supreme Courts have reached results which sustain the position asserted by Petitioner herein.

In *Foster v. Board of County Commissioners*, 7 Minn. 140 (1882), the County attempted to place a tax upon the personal property of an Indian trader living within the Winnebago Reservation. In finding against the County, the court emphasized that "Congress has the sole and exclusive jurisdiction over the

subject of intercourse with the Indian Tribes". Relying quite heavily upon *McCullouch v. Maryland*, 4 Wheat. 415 (1819), the Court further decided that the power to tax the plaintiff was the power to economic destruction and that such power was "incompatible with the exclusive jurisdiction over the regulation of this commerce which we have shown to exist in the Congress of the United States."

The Supreme Court of Colorado in *Whyte v. District Court*, 346 P. 2d 1012 (1959), reached the same conclusion when it stated the law succinctly:

> "Under the Constitution of the United States the jurisdiction of the Federal government over all Indian affairs is plenary and subject to no diminution by the States in the absence of specific congressional grant of authority to them to act. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410; *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691.
>
> As a corollary to Federal sovereignty it is clear that state laws have no force within the territory of an Indian tribe in matters affecting Indians. *Patterson v. Council of Seneca Nation*, 245 N.Y. 433; 157 N.E. 734; *Blanset v. Garden*, 256 U.S. 319, 41 S.Ct. 519, 65 L.Ed. 950; *Dole v. Irish*, 2 Barb. (N.Y.) 639; *Oklahoma Land Co. v. Thomas*, 34 Ok. 681, 127 P. 8; *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820; *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 902. As stated by Cohen in his Federal Indian Law at page 120, 'It

> is well settled that the State has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the federal government.'"

It was contended in *Whyte* that Colorado had jurisdiction over Indian affairs because the State did not in its constitution disclaim jurisdiction over Indian land. The Court rejected this contention, holding:

> . . . it is entirely clear that this failure to do so cannot conceivably result in Colorado jurisdiction over Indian Affairs. (The court then discussed Donnelly v. United States). . . . The test is not whether a State has disclaimed such a jurisdiction but whether Congress has authorized such a jurisdiction within the State. . . . (The Court then discussed the impact of 18 U.S.C.A. Section 1162 authorizing States to qualify for jurisdiction over certain aspects of Indian affairs by amending their Constitutions or laws.)

It should thus be plain, as Cohen, in his *Handbook*,* states at page 116:

> "That State laws have no force within the territory of an Indian tribe in matters affecting Indians is a general proposition that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided (in 1832) in Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483) that the State of Georgia had no right to imprison a white man residing on an Indian reservation with the consent of tribal and federal authorities, who refused to conform to State laws governing Indian affairs."

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*Felix S. Cohen's *Handbook of Federal Indian Law* published by the United States under the direction of the Office of the Solicitor of the Department of Interior (1958).

The more recent case of *Snohomish County v. Seattle Disposal Company,* 425 P. 2d 22 (1967), involved legal issues similar to those in the instant case. There, the county was attempting to enjoin a non-Indian plaintiff from disposing of garbage without a conditional use permit on land leased from the Tulalip Indian Tribe and located within the Snohomish County. The Washington Supreme Court observed the limited applicability of Public Law 280 (28 U.S.C. 1860) and then noted that the imposition of any zoning regulations upon Indian trust lands was contrary to both the words and intent of Public Law 280 and thus contrary to the concept of the Federal Government's exclusive jurisdiction. Furthermore, the court was not disturbed by the fact that the County was seeking to control the lessee's use of the land and not the Indian's use; in reaching the substance of the County's scheme, the court declared:

> "Limitation on the use to which a lessee from the Tulalip Tribes can put Indian lands is limiting the Indian use. *The county cannot indirectly accomplish prohibited interference with property that it could not accomplish directly.*" (Emphasis ours) *supra* at 26.

Thereafter, in 1968, in a case closely analogous to the one at bar, the Washington Supreme Court declared that a State tax could not be imposed upon the interests of a non-Indian spouse in the property of a reservation Indian land owner, or upon the interests of a Lessee in improvements constructed upon trust land.

> *Makah Indian Tribe v. Clallam County,* 73 Wash. 2d 677; 440 P. 2d 442.

The property under consideration in the *Makah* case, *supra,* was utilized in a commercial enterprise

which did business with non-Indians. The court therein stated:

> "The reasons for such a ruling lie almost exclusively in the discernible Federal policy of encouraging Indians to become economically self-sufficient on their reservation . . . that the Makahs, while receiving most of the benefits of tax payers and citizenship, escape some of the correlative responsibilities of citizenship, is a problem for the Congress and the President to solve."

II.

The Possessory Interest Tax in the Case at Bar Constitutes an Illegal Interference With the Tribe's Taxing Power.

It has long been recognized that one of the powers essential to the maintenance of any government is the power to levy taxes. In fact, chief among the powers of severeignty recognized as pertaining to Indian tribes has been the power of taxation. That particular power is an attribute of tribal quasi-sovereignty which continues unless withdrawn by an Act of Congress or limited by treaty.

> *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,* 231 F. 2d 89, 96 (1956).

A landmark case in this field is the case of *Buster v. Wright,* 135 Fed. 947 (1905), appeal dismissed 203 U.S. 599. Under the facts of that case, the Creek Nation, one of the five civilized tribes, imposed a tax for a license fee upon all persons, not citizens of the Creek Nation, who traded within the borders of that

Nation. The Interior Department specifically requested the advice of the Attorney General as to the legality of such a tax, and was advised that the tax was legal and that the Interior Department was under an implied duty to assist in its enforcement. Immediately thereafter the Interior Department promulgated appropriate regulations to aid the Tribe in making collection of the license fees. The plaintiffs in the case of *Buster v. Wright, supra,* were traders doing business on townsites within the geographical boundaries of the Creek Nation, who sought to restrain officers of the Creek Nation and representatives of the Interior Department from closing down their business and evicting them for non-payment of taxes. On a Demurrer, the plaintiffs' Bill was dismissed by the trial court. The decision of the trial court was then affirmed by the Court of Appeals of the Indian Territory, again by the Circuit Court of Appeals for the Eighth Circuit, and finally by the United States Supreme Court. The erudition of Judge Sanborn, Circuit Court of Appeals, illuminates the entire subject:

> "* * * It may not be unwise, before entering upon the discussion of this proposition, to place clearly before our minds the character of the Creek Nation and the nature of the power which it is attempting to exercise.
>
> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and

essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

Originally an independent tribe, the superior power of the republic early reduced this Indian people to a 'domestic, dependent nation' (Cherokee Nation v. State of Georgia, 5 Pet. 1-20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive and judicial functions within its territorial jurisdicton for more than half a century. The governmental jurisdiction of this nation was neither conditioned nor limited by the

original title by occupancy to the lands within its territory. * * *

* * * Founded in its original national sovereignty, and secured by these treaties, the governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889. Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed.

* * * It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to gov-

> ern the people with its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." (at pp. 949-952).

"A similar opinion was rendered by the Attorney General (23 Ops. Atty. Gen. 528) with respect to the right of the Cherokee Nation to impose an export tax on hay grown within the limits of the reservation. The opinion of the Attorney General suggested that tribal authority to impose such a tax would remain 'even if the shipper was the absolute owner of the land on which the hay was raised.' This suggestion was referred to and approved by the United States Supreme Court in *Morris v. Hitchcock,* (194 U.S. 384, 392)."

"In the latter case, the Court of Appeals of the District of Columbia, considering the validity of a tax or fee imposed by the Chickasaw Nation upon the owners of all cattle grazed within the Chickasaw territory, analyzed the status and powers of the Chickasaw Nation in these terms:

> 'A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. *Board Trustees v. Indiana,* 14

original title by occupancy to the lands within its territory. * * *

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How, 268, 272; *Talbott v. Silver Bow Co.*, 139 U.S. 438, 448. Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulation of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article Z of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of noncitizens, or the taxation of property actually within the limits of that government and enjoying its benefits,' (*Morris v. Hitchcock*, 21 App. D.C. 565, 593).

"In the case of *Maxey v. Wright* (3 Ind. T. 243, 54 S. W. 807, aff'd. 105 Fed. 1003), the right of an Indian tribe to levy a tax upon a non-member of the tribe residing on its reservation was held to be an essential attribute of tribal sovereignty, which might be curtailed by express language of a treaty or statute, but otherwise remained intact. In that case the court declared:

'* * * in the absence of express contradictory provisions by treaty, or by statute of the United States, the Nation (and not a citizen) is to declare who shall come within the boundaries of its oc-

cupancy, and under what conditions.' (at page 36)."

"See, to the same effect, 17 Ops. Atty. Gen. 134; 18 Ops. Atty. Gen. 34."

The imposition of a Possessory Interest Tax by the County of Riverside upon Lessees of Agua Caliente trust lands is double taxation. In viewing this same type of problem on repeated occasions in interstate commerce cases, this Honorable Court has invalidated actual or potential double taxation.

Railway Expenses Agency, Inc. v. Virginia, 347 U.S. 359, 367-8 (1954);

Freeman v. Hewit, 329 U.S. 249, 256-7 (1946);

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311-12 (1938).

The Possessory Interest Tax, as applied to Lessees of Agua Caliente Indian trust lands, should not be allowed to stand since it is double taxation in classic form. In competition with the right of tribes to impose taxes within their own reservations, the state tax must fall.

Conclusion.

It becomes undeniable that:

(1) The Possessory Interest Tax by the County of Riverside in actuality becomes a tax upon the Indian, which, if allowed to stand, will frustrate performance by the United States of America as trustee.

(2) Indian Tribes have attributes of sovereignty which include the power to tax without interference by any other sovereign, thereby permitting Indian Tribes

to exercise their inherent power of local self-government. Accordingly, the hereinafter named Amici Curiae strongly urge this Honorable Court to grant the Agua Caliente Indians' Petition for Certiorari.

Dated: August 9, 1971.

Respectfully submitted,

THE FORT MOJAVE INDIAN TRIBE, OF ARIZONA, CALIFORNIA AND NEVADA,

THE SOUTHERN UTE TRIBE, OF COLORADO,

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, OF WASHINGTON,

THE QUECHAN INDIAN TRIBE OF THE FORT YUMA RESERVATION, OF ARIZONA AND CALIFORNIA,

THE MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION, OF WASHINGTON,

THE CABAZON BAND OF MISSION INDIANS, OF CALIFORNIA,

THE LUMMI INDIAN TRIBE OF THE LUMMI RESERVATION, OF WASHINGTON,

THE YAVAPAI PRESCOTT COMMUNITY ASSOCIATION, OF ARIZONA.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

Oct. Term 1971

No. 71-183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRICILLA GONZALES, GLORIA GILLETTE, PATRICK PATENCIO, and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted Land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Plaintiffs,

vs.

THE COUNTY OF RIVERSIDE, a political Subdivision of the STATE OF CALIFORNIA,

Defendant.

BRIEF OF JAMES A. HALEY, AS AMICUS CURIAE.

HONORABLE JAMES A. HALEY,
Congress of the United States,
House of Representatives,
Washington, D. C. 20515.

JAMES A. HALEY,
Member, United States Congress, Chairman of Indian Subcommittee, and Interior and Insular Affairs.
As Amicus Curiae.

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IN THE

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No. .....

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRICILLA GONZALES, GLORIA GILLETTE, PATRICK PATENCIO, and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted Land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Plaintiffs,

vs.

THE COUNTY OF RIVERSIDE, a political Subdivision of the STATE OF CALIFORNIA,

Defendant.

BRIEF OF JAMES A. HALEY, AS AMICUS CURIAE.

Pursuant to Rule 42(2) and the written consent of the parties hereto, The Honorable James A. Haley, Member of Congress, does hereby file this brief as Amicus Curiae.

Interest of Amicus Curiae.

The Honorable James A. Haley, Member of the United States Congress, representing the Seventh District of the State of Florida, became a member of the Indian Subcommittee of the Interior and Insular Affairs Committee in January of 1953, and has been Chairman of said Committee since 1955. In that capacity, and operating under the plenary powers vested in the

Congress by the Constitution of the United States, he has become thoroughly conversant with the critical problems of the American Indian people in their struggle for economic development. As a consequence he has participated and has actively fought for constructive legislation which would enable the United States to carry out its trust duties to these Indians. In so doing, he has also encountered many adverse interests who have carefully contrived to erode away the legislation intended to benefit Indians. Because of the ever-increasing desire by the States and their political subdivisions for new revenue, he has detected their role as an adversary who actively strives to terminate the Indian trust status at the earliest possible date. His interest in the instant proceeding, therefore, is to let the Court know that the economic impact of the imposition of a possessory interest tax on Indian Lessees in Riverside County is not confined to the Agua Caliente Indians, but that the impact thereof upon all Indian tribes operating under a Federal Trust, may be devastating. Furthermore, he believes that the work of the Congress in their effort to improve the economic lot of Indians and to encourage them to govern themselves may be seriously impeded by such taxation by the States and their political subdivisions.

Questions Presented.

The sole question presented in this case is whether a California County can impose a possessory interest tax upon leases of land on an Indian reservation where the lands involved are still held in trust by the United States of America as Trustee for the sole use and benefit of the Indians.

ARGUMENT.

I.

The Application of the California Possessory Interest Tax to Lessees of Indian Land Still Held in Trust by the United States of America Violates the Constitution and Laws of the United States.

A. Article I, Section 8, Clause 3 of the Constitution Vests in the Federal Government an Exclusive Right to Regulate and Control Commerce With Indian Tribes.

The power of Congress to regulate commerce with Indian tribes has been described as "paramount and of a most sweeping character." *People ex rel. Ray v. Martin*, 294 N.Y. 61; 60 N.E. 2d 541 (1945); affirmed 326 U.S. 496 (1946). The broad scope of the power, expressed in Article I, Section 8, Clause 3 of the Constitution, stems from a recognized need in the early days of our nation to develope a uniform, nation-wide policy in the conduct of Indian affairs. As explained by this Court, in *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876), 194:

> "Under the Articles of Confederation of 1777, two limitations were placed upon the power of Congress of Indian affairs. The Indians must not be members of a State, nor must Congress do anything to violate or infringe the legislative right of the State within its own limits. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; Congress now has the exclusive and unfettered power to regulate commerce with Indian tribes, power as broad as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general Government."

Also see, *Dick v. United States,* 208 U.S. 340, 356 (1908); *Perrin v. United States,* 232 U.S. 478, 484 (1914).

On other occasions, the power of Congress to regulate commerce with Indian tribes has been said to be "not less than the power over commerce among the States." *Hanley v. Kansas City S. R. Company,* 187 U.S. 617, 619 (1903). Regardless of the characterization employed, this Court in each such case ruled that Article I, Section 8, Clause 3 vests an exclusive power in Congress to regulate commerce with Indian tribes and precludes regulation thereof by any State.

Commerce with Indian tribes means commerce with the individuals who compose those tribes. *United States v. Holliday,* 3 Wall. (U.S.) 407, 417 (1866); *United States v. Nice,* 241 U.S. 591 (1960). In the case at bar, the County, by imposing a possessory interest tax upon Lessees of Indian trust land, is clearly contravening the Indian commerce clause of the Federal Constitution: *Cohen, Federal Indian Law (Interior Department Revision, 1968) Pages 8 to 67, to 73; 57 Decision of the Department of Interior 124 (1940),* confirmed in *58 Decision Department of Interior 562 (1943).*

Certainly the intent of Congress in granting Indians the right to enter into long-term leases was to precipitate and accelerate economic development on Indian trust lands. At no time did the Congress intend to negate the economic advantages they had given Indians by virtue of their tax exemption with the passage of a long-term leasing law which would give them revenue from these same lands. In other words, this is an instance where "* * * the general rule that Statutes

passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expression being resolved in favor of the Indians." *Alaska, Pacific Fisheries v. United States,* 248 U.S. 78, 89. To the same effect see *Seufert Bros. Company v. United States,* 249 U.S. 194; *Shoat v. Trapp,* 224 U.S. 665; *Jones v. Meehan,* 175 U.S. 1 and *Minnesota v. Hitchcock,* 185 U.S. 373, 402.

B. The Federal Government Has Pre-Empted the Field of Regulating Indian Commerce.

In accordance with Article I, Section 8, Clause 3 of the Constitution, Congress has exercised its authority to regulate commerce with Indian tribes. Specifically the *Act of July 9, 1832, 4 Stat. 564; 25 U.S.C. Sec. 2,* provides that:

> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of *all* Indian affairs and of *all matters* arising out of Indian relations." (Emphasis ours).

Reading the above Statute, together with *25 U.S.C., Sec. 415,* plus the extensive leasing regulations set forth in *25 C.F.R.,* shows that there has been a comprehensive Congressional scheme to control the economic development precipitated by long-term leasing on Indian reservations. So total has been Federal occupation of Indian leasing that any State Legislation affecting such commerce with Indian tribes in Indian country, including the possessory interest tax imposed by the County of Riverside, is, therefore, *prima facie* invalid under the doctrine of pre-emption.

II.

The Imposition of the California Possessory Interest Tax Upon Lessees of Indian Trust Land Constitutes an Illegal Interference With Tribal Sovereignty.

Indian tribes were early recognized as distinct, independent political communities in which the laws of a State could have no force or effect, and into which its citizens had no right to intrude. *Worcester v. Georgia*, 6 Peter (U.S.) 515, 558-61 (1832). "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester has remained.*"

Williams v. Lees, 358 U.S. 217, 219 (1959).

The test of whether a State Statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government." *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-8, 75 (1962); *Williams v. Lees, supra*, at 220.

The power to levy taxes is an inherent attribute of tribal sovereignty, and, except as limited by treaty or act of Congress, properly may be exercised over non-Indians doing business within the exterior boundaries of Indian reservations. *Iron Crow v. Oglala Sioux Tribe*, 231 Fed. 2d 89, 98 (1956); *Buster v. Wright*, 135 Fed. 947 (1905), appeal dismissed 203 U.S. 599 (1906); *Morris v. Hitchcock*, 21 Appellate D.C. 565 (1903), affirmed 194 U.S. 384 (1904); *Federal Indian Law (Interior Department Revision)* (1958), pages 345-39; *55 Decisions of the Department of the Interior 14, 46-8*. The federal government has not exempted approved Lessees of Indian trust lands from tribal taxes. Indeed, far from restricting taxing power

of Indian tribes, the Congress during recent years has actually encouraged and assisted Indians to assume ever-increasing responsibilities of the management, conduct and support of their local government. *Williams v. Lee*; *supra*, at 222; *Iron Crow v. Oglala Sioux Tribe*, *supra*, at 99.

The possessory interest tax, as applied to Lessees of Indian trust land, necessarily conflicts with any tax that the tribe having jurisdiction over that area might wish to impose upon the same Lessee. If both taxes are assessed, the added cost of doing business either must be absorbed by the Lessee, or more than likely, will be shifted to the Indian Lessors, as so graphically evidenced by the uncontradicted record in the case at bar. In other words, the tax burden will shift to the Indian Lessor. If this is allowed to continue it will merely complicate the already herculean task confronting Congress in their efforts to encourage Indian tribes to assume further responsibilities for the management, conduct and support of their local tribal governments.

Conclusion.

On the basis of the foregoing, the conclusion is inescapable that the California Possessory Interest Tax, as applied to Lessees of Indian Trust lands is:

(1) A violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and

(2) An illegal interference with the exercise by Indian tribes of inherent powers of local self-government.

Accordingly, the Honorable JAMES A. HALEY, as Amicus Curiae, respectfully requests that this Hon-

orable Court acknowledge the true and broad import of the legal question presented by the case at bar and, therefore, urges that the Indians' Petition for Certiorari be granted.

Respectfully submitted,

JAMES A. HALEY,
Member, United States Congress, Chairman of Indian Subcommittee, and Interior and Insular Affairs.
As Amicus Curiae.

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Petitioners,

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Respondents.

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David H. Getches
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Counsel for *Amici Curiae*

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Petitioners,

VS.

THE COUNTY OF RIVERSIDE, a Political Subdivision of the STATE OF CALIFORNIA,

Respondents.

BRIEF OF NATIVE AMERICAN RIGHTS FUND, CALIFORNIA INDIAN LEGAL SERVICES, AND DINEBEIINA NAHIILNA BE AGADITAHE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI CURIAE

Petitioners and Respondents have filed with the Clerk of the Court a written stipulation consenting to the filing of this brief. *Amici* each have a considerable interest in the outcome of the case and are particularly qualified in the specialized area of Indian law.

Native American Rights Fund is a non-profit corporation providing legal representation and counsel to Indians and Indian tribes throughout the country in cases of major significance. The Fund is supported principally by private grants and contributions. It participates as *amicus curiae* in this case because of the broad importance and impact which the decision will have on all of its clients and upon every Indian tribe in the country which possesses land.

California Indian Legal Services (CILS), and Dinebeiina Nahiilna Be Agaditahe (DNA), are non-profit corporations supported by the Legal Services Program of the federal Office of Economic Opportunity. CILS is a state-wide program providing legal assistance to low income Indians and Indian tribes in California and has been especially active in the area of law related to Indian resources and in economic development activities. DNA operates within the Navajo Indian Reservation in Arizona, New Mexico and Utah, representing Indians who otherwise would be unable to afford legal counsel. Both CILS and DNA regularly represent clients whose interests will be seriously affected by the decision in this case.

Statement

The decision below of the Ninth Circuit Court of Appeals, affirms the ruling of the District Court for the Central District of California, that the state, acting through one of its counties, may impose a real property ad valorem tax upon leasehold interests in lands held in trust by the United States for Indians. This holding raises grave questions of federal Indian law and public policy.

In a case of first impression before this Court, important issues are raised concerning:

a. Whether a state may impose a property tax on lessees, the incidence of which is on Indian beneficial owners and

lessors of the property, in spite of statutory language guaranteeing the land to the Indians "free of encumbrance" and specifically prohibiting its taxation;

b. Whether such a tax interferes with the sovereignty of Indian tribes by impairing the ability of the tribe to impose its own tax;

c. Whether such a tax can be sustained although it frustrates a clear federal policy and program of encouraging the leasing of Indian lands as a means of attaining economic development and self-sufficiency; and

d. Whether Congress has, by its careful supervision of the Indian leasing program, occupied the field to the extent that state taxation of leasehold interests is precluded.

Reasons for Granting the Writ

Amici join with Petitioners in asserting all the reasons contained in the Petition for a Writ of Certiorari. The Petition comprehensively discusses the several areas in which the courts below erred and the reasons why this Court ought to review the matter. *Amici* wish to place special emphasis in this brief on the consequences of the decision below for Indians throughout the nation and its impact on federal Indian policy.

1. **The case raises issues under federal law of broad national importance.**

Through the accidents of history, a patch of the vast desert east of Los Angeles has become a well-known playground for the wealthy. Palm Springs, coincidentally, is the location of lands set aside for the Agua Caliente Band of Mission Indians. It was no special gesture of altruism which led the United States to reserve the checkerboard of noncontiguous sections of land for the Agua Caliente Indians;

the land was just another arid, then rather undesirable, part of a newly settled state. The fact that the lands of the Agua Caliente Tribe have skyrocketed in value makes the tribe, along with a few other tribes nationally (such as some whose lands happened to be situated over rich oil pools or mineral deposits), an exception to the rule that the least attractive, most unproductive lands in the nation were reserved to Indians.

> The first Americans — the Indians — are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement — employment, income, education, health — the condition of the Indian people ranks at the bottom.
>
> * * *
>
> Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500. As I said in September of 1968, it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure.

Richard M. Nixon, Message to Congress, July 8, 1970, 1970 U.S. Code, Cong. & Admin. News, pp. 2965-2974.

The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust

responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past, and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities.[1]

The United States recognized that the reservation system imposed severe limitations on the ability of Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, came a policy of encouraging economic development and self-sufficiency. This policy was implemented by means of

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[1]It is the primary purpose of the Bureau of Indian Affairs to implement a federal policy of changing this situation.

Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees considering its budget request:

> The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum economic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward the attainment of these goals through two basic programs, one of which is education, and the other is the economic development of reservation resources.

See, e.g., Hearings, House Subcommittee on Appropriation for the Department of the Interior and Related Agencies for Fiscal Year 1969 at p. 744.

For a full discussion of the goals, problems, and needs of the national program for Indian economic development, see Joint Committee Print, Subcommittee on Economy in Government of the Joint Economic Committee, "Toward Economic Development for Native American Communities," 91st Cong., 1st Sess., 1969.

several programs and incentives. The Indian Leasing Act (25 U.S.C. §415) is one of the most successful federal programs designed to meet the nation's obligation to the Indians and to break the cycle of poverty. The future of that program is in grave doubt if Indians lose by judicial fiat the slim but important margin of advantage Congress has afforded them through exemption of their land and its income from taxation.[2]

It was demonstrated in the district court below that property tax exemption is an effective means of increasing the development of trust land that would otherwise be of little interest to developers. Application of the tax, on the other hand, has adverse consequences upon the Indian lessors. At Agua Caliente, imposition of the tax has resulted in rent arrearages, lease defaults, and seizures by the county of interests in Indian land. Because of the tax, lower rentals must be accepted and, in fact, fewer leases are made.

There is no doubt that, while the possessory interest tax in question is collected from lessees, the impact of the tax is upon the Indian lessors. The Court of Appeals below concluded:

> [A] lessee can pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax, he enjoys a better bargaining position than he otherwise would, and hence the tax has an adverse economic effect upon him.

Agua Caliente Band of Mission Indians v. County of Riverside, No. 25, 298 (9th Cir., May 12, 1971), slip opinion, p. 4.

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[2]It has been held that tax exemption is a property right vested in the Indians, *Choate v. Trapp*, 224 U.S. 665 (1912).

The effect of the possessory interest tax is to frustrate severely the federal goal of encouraging Indians to utilize their land to become economically self-sufficient. The tax has had this effect even on the Agua Caliente Band of Mission Indians, who are in a much better financial position than most Indians. If the tax can be so damaging to the Agua Calientes, it is not hard to comprehend the devastating effects similar taxes would have on less fortunate Indians.

The effects of this tax will not be confined to the few score Indians who are fortunate enough to belong to the exceptionally desirable and valuable Agua Caliente Indian Reservation in Southern California. Nearly every tribe and Indian holding any land is subjected to a potential economic threat if the legality of taxation of leasehold interests in Indian lands by states is sustained. At the present time, about twenty per cent of all Indian trust land is leased, accounting for substantial annual revenues to the Indian beneficial owners.[3]

This Court has many times considered whether various forms of state and federal taxation are applicable to Indians.[4] This case, however, presents a serious new question for the court's decision. Riding on the decision may be the success of an Indian leasing program which provides some measure of hope in the future for the country's most disadvantaged minority. A matter of such grave importance demands the attention of this Court. *Williams v. Lee*, 358

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[3]Revenues amounted to about $57,000,000 in fiscal 1970 for about 55,408,000 acres under lease. Bureau of Indian Affairs, Office of Economic Development, Real Property Management, *Annual Report on Indian Lands and Income from Mineral and Surface Leases* (June, 1970).

[4]E.g., *Squire v. Capoeman*, 351 U.S. 1 (1956); *Board of Commissioners v. Seber*, 318 U.S. 705 (1943); *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Choteau v. Burnet* 283 U.S. 691 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Rickert*, 188 U.S. 432 (1903); *The Kansas Indians*, 72 U.S. 737 (1866).

U.S. 217 (1959); *cf. United States v. Coleman*, 390 U.S. 599 (1968).

2. The decision of the Court of Appeals did not have the full support of the panel and was questionable on the merits.

The Ninth Circuit Court of Appeals ruled below in a two to one decision that, under the precedents of this Supreme Court, the State of California could impose a possessory interest tax on leasehold interests in Indian lands. Judge Smith[5] writing for the majority, found the arguments of Petitioners "persuasive" but reluctantly concludes that two decisions of this Court, *United States v. Detroit*, 355 U.S. 466 (1958), and *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), are dispositive of this case adversely to Petitioners. Circuit Judge Ely, in a strong dissent, found that the two cases are rather clearly and logically distinguishable. The inapplicability of *United States v. Detroit* and *Oklahoma Tax Commission* is cogently explained in the Petition for Certiorari. Judge Ely found, and we urge, that the most compelling reason for striking down the county tax as it applies to Indians is the superior federal policy of protecting and advancing Indian interests.

Also, the court below ignored the urgings of Petitioners and *amici curiae* that federal statutes specifically prohibit taxation by setting aside the lands in question "in trust for the sole use and benefit" of the Indians to be conveyed to them at the end of the trust period "free of all charge or encumbrance whatsoever" Mission Indian Relief Act of 1891, 26 Stat. 712. Other statutes and regulations which would prevent taxation of Indian lands by the county were not dealt with. *E.g.*, 28 U.S.C. §1360(b); 25 C.F.R. pt. 1.4.

Furthermore, an infringement upon tribal sovereignty is

[5]District Judge, District of Montana, sitting by designation.

inherent in the scheme to tax leasehold interests in Indian lands. It is clear that the right of an Indian tribe to govern itself includes the authority to collect revenue.[6] As a practical matter, the county tax completely undermines the authority; if the tribe were to insist that its tax be paid on top of the county's tax, leasing of Indian land would not be economically feasible. The Court of Appeals did not address itself to the sovereignty issue. To allow a county to impose its tax on Indian land in the face of tribal jurisdiction to tax contradicts the principle that "two self-governing bodies cannot have dual and co-existent jurisdiction and control within the same territory at the same time." *Your Food Stores v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, 956 (1961), *cert. denied* 368 U.S. 915 (1961); see also *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956).

Because of extensive legislation and activity in the field of Indian leasing[7], it is reasonable to conclude that the federal government has preempted the field and that Congress did not intend that national Indian policy would be dependent upon fluctuating local tax rates and differing schemes of taxation. *See, e.g., Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). Again, the court below did not even discuss the argument.

The two majority members of the court which decided the case below rested their holding on precedent from two inapplicable cases, failed to consider statutory prohibitions against taxation, and did not reckon with the questions of impairment of tribal sovereignty or federal preemption. Only

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[6] *Merris v. Hitchcock*, 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89 (8th Cir. 1956); *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906). *See generally*, United States Department of the Interior, *Federal Indian Law* (1958), pp. 435 *et seq.*

[7] *E.g.*, 25 U.S.C. §§415 *et seq.*; 25 C.F.R. part 131 *et seq.*

the dissenting judge perceived the great importance of the federal policy concerning Indian economic development and the destructive impact on this policy which results from allowing local governments to tax Indian leaseholds. In a case such as this, where there has been a questionable or doubtful determination in the court below, it is appropriate to grant certiorari. *E.g., Williams v. Lee,* 358 U.S. 217 (1959).

3. **In exercising its supervisory power over federal courts, the Supreme Court should review cases in which the judiciary has invaded the province of the legislative branch.**

The individual case of the Agua Caliente Indians may move a court to conclude that tax exemption results in an unfair advantage for Indians. This is not a sound basis for a decision affecting 245 tribes on Indian reservations throughout the country. Furthermore, if a decision is to be made that the Agua Caliente Indians, or any others, are ready in terms of economics and their own competence to assume the burdens of taxation and are to be released from the guardianship of the United States, either completely or partially, the judgment is one best considered and made by Congress, and not by the courts. *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339 (1941); *Beacher v. Wetherby,* 95 U.S. 517 (1877); *Johnson v. McIntosh,* 8 Wheat. (U.S.) 543 (1823). Transfers or other acts of the beneficial owner of Indian land do not defeat the trust or any of its intended attributes such as tax exemption, and that only Congress is in a position to do. *Board of County Commissioners v. Seber,* 318 U.S. 705 (1943). The Supreme Court held in *Seber* that tax exemption followed the land stating:

> Respondents received the land . . . subject to restrictions of indefinite duration which the Secretary of the Interior had authority to impose. It

> seems only fair. . . . that *the tax exemption should follow the restrictions and continue so long as they do*, unless Congress meanwhile provides to the contrary. [Emphasis added]

318 U.S. at 713.

The control exercised by Congress over the permissible terms of leases on Indian lands has been extensive. For instance, the Indian Leasing Act, 25 U.S.C. §415, has been amended nine times since 1959 to allow leases up to 99 years on certain reservations, departing from the usual 50 year limit[8]. Each case was separately and carefully considered by Congress and, in spite of repeated recommendations by the Department of the Interior that the authority to enter into 99 year leases be extended to all reservations, Congress has rejected the suggestion. *See, e.g.*, H. Rep. 2346, September 12, 1962, accompanying H.R. 8113, which amended 25 U.S.C. §415, 1962 U.S. Code, Cong. and Admin. News, p. 2941; S. Rept. 829, November 30, 1967, accompanying H.R. 4919, which amended 25 U.S.C. §415, 1968 U.S. Code, Cong. and Admin. News, p. 2318. Congress has even enacted special statutes for certain reservations setting required terms and limitations based upon individual circumstances. *See e.g.*, 25 U.S.C. §§416-416j. Indeed, Congress has acted to eliminate tax exemptions in the case of specific types of leases on some Indian lands. *See e.g.*, 25 U.S.C. §§398c, 401. Congress is certainly better equipped than federal courts or the states to make judgments on a case by case basis regarding the unique circumstances of each tribe and its ability to pay taxes.

The determination of at what point Indians are prepared to assume the full responsibilities of citizenship, such as the

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[8]Congress's almost jealously guarded control over Indian leasing policy is an exercise of its plenary power over Indian affairs. *E.g., United States v. Hellard*, 322 U.S. 363 (1944); *United States v. Kagama*, 118 U.S. 375 (1886).

burdens of taxation, is a policy decision for Congress to make. By interpreting the acts of Congress in such a way as to remove an advantage intended for Indians, and by deciding that a state can engage in a practice of taxation which interferes with the important federal policy of encouraging leasing of Indian lands, the court below has necessarily made judgments best reserved to Congress. As stated in *United States v. Detroit, supra,*

> Wise and flexible adjustment of inter-governmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

355 U.S. at 474.

The effect of the decision of the Ninth Circuit Court of Appeals in this case has been to alter the status of the Agua Caliente Indians by removing a special protection and property right intended for them by Congress. Further, the decision is precedent for the alteration of the special status of Indians throughout the country by any state which has or enacts a possessory interest tax. Thus, the holding is outside the area in which a court properly functions and the Supreme Court, in its supervisory role, should grant a writ of certiorari to the Court of Appeals so that the situation created can be rectified.

Conclusion

Certiorari should be granted in this case because of its profound importance to Indians. Imposition of a possessory interest tax upon Indian lands frustrates a clear federal policy favoring long term leasing by Indians and, generally, the policy of economic development of reservation resources.

The court's opinion below also avoids several important arguments which would nullify the tax based upon violation of federal statutes and regulations, interferences with tribal sovereignty, and federal preemption. Any or all of these additional reasons would reverse the holding in the Court of Appeals.

For the reasons set forth in this brief, *amici* urge the Court to grant certiorari so that this vitally important case can be decided properly on its merits.

Respectfully submitted,

Native American Rights Fund
California Indian Legal Services
Dinebeiina Nahiilna Be Agaditahe

By David H. Getches

Counsel for *Amici Curiae*

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
SEP 4 1971
E. ROBERT SEAVER, CLERK

October Term, 1971
No. 71-183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

RAY T. SULLIVAN, JR.,
County Counsel,
County of Riverside,

STEVEN A. BROILES,
Deputy County Counsel,
300 Law Library Building,
3535 Tenth Street,
Riverside, Calif. 92501,
(714) 787-2421,

Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

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THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit and dissenting opinion were filed on May 12, 1971, and are reported at 442 F.2d 1184. A copy of these opinions is attached to Petitioners' brief and marked Appendix C. The opinion of the United States District Court, Central District of California, was filed on October 17, 1969, and is reported at 306 F.Supp. 279. A copy of this opinion is attached to Petitioners' brief and marked Appendix B.

Jurisdiction.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and Rule 22 of the Rules of the Supreme Court of the United States. The judgment of the Court of Appeals for the Ninth Circuit was entered on May 12, 1971, and the petition for certiorari and the certified record were filed within 90 days of that date.

Questions Presented.

1. Whether or not a non-Indian lessee is exempt from property taxes assessed against his commercial lease of Indian trust land and other property.

2. Whether or not there is a plain, speedy and efficient remedy in the California courts to test the validity of the assessment of the possessory interest tax against non-Indian lessees of Indian trust lands so that the Tax Injunction Act (28 U.S.C. §1341) bars the Petitioners' suit.

Statutes Involved.

The relevant statutes are set forth in Appendix A. They are the following:

28 U.S.C. §1360
28 U.S.C. §1341
Mission Indian Relief Act of January 12, 1891, c. 65, 26 Stat. 712
California Revenue and Taxation Code §107

Statement of the Case.

This is an action brought by an Indian band and allottees to recover damages and to permanently enjoin the collection of possessory interest taxes by the County of Riverside from non-Indian lessees of Indian trust lands.

The trust lands comprise the Agua Caliente (Palm Springs) Indian Reservation. The reservation contains 26,696.28 acres of mostly non-contiguous sections of land in and around the resort city of Palm Springs, California. [T. 174, line 25, to T. 175, line 3.] The trust provisions under which the United States holds title for the use and benefit of the band and allottees is contained in the Mission Indian Relief Act of January 12, 1891, c. 65, 26 Stat. 712, and later amendments. [Amended Pre-trial Order, R. 509, lines 1-6; T. 21, line 24, to T. 25, line 8.]

The tax complained of in this action was first levied on non-Indian lessees in 1961. [T. 126, lines 11-16.] It is an *ad valorem* property tax assessed against the improvements and leasehold interest owned by non-Indian lessees of Petitioners. The measure of the tax is the market value of the property owned by the lessee, excluding the tax-exempt interest of the Indian. In making his appraisal, the County Assessor first determines the value of the land, assuming that the fee is unrestricted; by the usual methods of valuing land. The Assessor then values the tax-exempt reversionary interest. Subtracting the value of the Indian's interest from the value of the land leaves the "true value" of the possessory interest. Additional deductions are made to reflect the risk associated with the lease and the restrictions contained in the lease agreement. The final result is the "full cash value" of the possessory interest. *County of Riverside v. Palm-Ramon Development Co.*, 63 Cal.2d 534, 47 Cal.Rptr. 377, 407 P.2d 289 (1965).

At present, 1250 acres of reservation land are under long-term lease. This includes 8 acres of tribally owned land. [T. 25, lines 5-7.] The majority of these leases

were executed after 1961. [T. 190, lines 4-8.] Long term leasing of land on the Agua Caliente Reservation was authorized in 1955 by the Act of August 9, 1955, c. 615, 69 Stat. 539, as amended, 25 U.S.C. §§415-415d. Although leasing of land on the reservation has been permitted since the turn of the century, it was not until 25-year lease terms were permitted that opportunities for lease development arose. Subsequently, it became apparent that this term was insufficient to attract large investment because of the lack of adequate financing available for leases with only 25 year terms. Therefore, in 1959, Congress extended the maximum lease term to 99 years. [T. 25, line 12, to T. 27, line 4; T. 68, line 23, to T. 69, line 7.] All leases of Indian trust land are subject to the provisions of 25 C.F.R. §131 *et seq.* and the approval of the Bureau of Indian Affairs.

Two leases of reservation lands were introduced into evidence at trial, one signed before and the other after the County first assessed the possessory interest tax against a non-Indian lessee. One lease is a long-term commercial lease executed January 21, 1958, between Palm Springs Spa, the predecessor in interest of Palm Springs Properties, and the Agua Caliente Band of Mission Indians.[1] [Pltf. Ex. 4, admitted T. 48.] This lease required the construction and installation of extensive improvements on the property by the lessee ($2,800,000.00). [Pltf. Ex. 4, R. 50, line 21, to R. 51, line 2.] The buildings, trade fixtures and personal property placed on the leased land become the property

[1]Palm Springs Spa is currently seeking in the State Courts, so far unsuccessfully, a refund of the possessory interest taxes it has paid to the County of Riverside. *Palm Springs Spa, Inc., v. County of Riverside,* 18 Cal.App.3d 372, ... Cal.Rptr. .... (1971).

of the Indian upon the expiration of the lease term. [Pltf. Ex. 4, R. 16, lines 22-28.] As amended, the lease is for an initial term of 99 years.

The lease is a percentage lease. The minimum rental is $36,000.00 per annum. The lessor also receives 5% of total sales except for food sales which is 1%. [T. 132, lines 3-11; Pltf. Ex. 4, R. 15, lines 2-21.]

The other lease was entered into on November 30, 1961, between Palm Springs Spa Annex and members of the Patencio family, allottees No. 15 to 18 inclusive. [Pltf. Ex. 10, admitted T. 195.] The lease is for a term of 99 years. Buildings, improvements, trade fixtures and personal property in the value of $1,500,000.00 are required to be constructed and installed, becoming the property of the Indian upon termination of the lease. [Pltf. Ex. 10, p. 7, line 30, to p. 8, line 14.]

This lease is also a percentage lease. The minimum rental is $4,680.00 per year for the first two years; $7,800.00 per year for the next two years, and $31,200.00 per annum thereafter. The determination of the excess over the rental minimum is based on 5% of hotel and other business receipts; 1% of restaurant receipts; 2½% of liquor sales receipts and a percentage of from 15% to 7½% of receipts from subleases of all other facilities depending upon the value of the improvements constructed on the premises. [Pltf. Ex. 10, pp. 4-5.] Possessory interest taxes on the lease are deducted in computing the percentage rental. [Pltf. Ex. 10, p. 4, lines 26-31.]

The location of the property leased pursuant to the Spa lease and the Spa Annex lease is in downtown Palm Springs. [T. 13, lines 8-24.]

Both leases provide that the lessee is to pay all taxes, general and special assessments, that may be assessed "upon or against the leased land and all interests therein and improvements and other property thereon to which either the lessor or lessee may become liable in relation thereto." [Pltf. Ex. 4, R. 17, line 26 to R. 18, line 10; Pltf. Ex. 10, p. 16, lines 6-17.]

The result of the imposition of possessory interest tax on the interest of non-Indian lessees was to introduce an added element to lease negotiations. [T. 228, line 15 to T. 229, line 9.] The Indian lessor in order to reach agreement in post-1961 lease negotiations, has to agree to a rental rate that considers the lessee's possessory interest tax payment.[2] [T. 12, line 16, to T. 219, line 24; T. 70, lines 17-19.] The imposition of the tax does not affect the fair market value of the Indian trust land [T. 234, lines 16-25; T. 242, line 22, to T. 243, line 5], there being no evidence to indicate that it results in the Indian lessor receiving less than the market established (fair) net return on the property. [T. 273, lines 6-15.]

In the opinion of Leonard M. Hill, Area Director for the Bureau of Indian Affairs, the impact of the tax on development has not been "particularly negative." [T. 31, lines 10-13 and T. 31, line 22, to T. 32, line 1.] The Department of the Interior's Palm Springs Task Force in its report "Administration of Guardianships and Conservatorships Established for Members of the Agua Caliente Band of Mission Indians" dated

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[2] It is not necessarily the fact that the possessory interest tax will indirectly affect the Indian's rental income. This was recognized at trial by Petitioners in their discussion of the several ways the tax could be accomodated by the market. [T. 212, line 16, to T. 215, line 22.]

March, 1968, does not list the tax as one of the several impediments to the economic development of the reservation. The Task Force Report is contained in *Hearings on H.R. 12273 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 90th Cong. 2nd Sess. ser No. 90—28, (1968) at pp. 19-193.

It is in contention of Petitioners that as a matter of law, Indian lessors are entitled to receive a net return on leases of trust land of 8% although the market or fair rate of net return is only 6%. [T. 306, line 16, to T. 307, line 5.] In order to receive this higher rate of return, California's possessory interest tax must be removed as a cost to the non-Indian lessee because the lessee is not willing to pay more to lease Indian land than non-Indian owned land. [T. 306, lines 5-10; T. 320, lines 2-6.].

ARGUMENT.

I.

The California Possessory Interest Tax May Be Validly Assessed Against Non-Indian Commercial Lessees of Indian Trust Land.

This action is somewhat bizarre in that the parties who are complaining of the tax are not the taxpayers. The petitioners' property interests are neither the subject of the challenged tax nor are their interests included in the measure of the tax. The tax is assessed against, and measured by the value of the non-Indian commercial leasehold estate that concurrently exists in their trust property. There is no way that ultimate liability for the tax can fall upon the Indians or the Federal Government. Even under the lease agreements offered into evidence and approved by the Bureau of Indian Affairs, the burden of paying the tax remains with the non-Indian lessees.

The basic question in this case is: Are Indian owners of Indian trust lands entitled to be free from any *indirect* economic impact of State taxes, thereby making tax exempt the property interests of their lessees who have no personal immunity and who lease the land for their own purposes and profit?

The Court of Appeals felt the Petitioners' position to be "untenable" [442 F.2d at 1187] and rested its decision on *United States v. City of Detroit*, 355 U.S. 466 (1958), and *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949).

In *United States v. City of Detroit, supra*, this Court upheld a tax similar to the California possessory interest tax, that was assessed against the leasehold estate of a government contractor.[3] To the argument that

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[3]Accord: *United States v. Township of Muskegan*, 355 U.S. 484 (1958).

the tax would decrease the rental income to the Government, this Court answered ". . . the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax." [336 U.S. at 472.]

Similarly, this Court speaking through Justice White in *United States v. Boyd*, 378 U.S. 39 (1964), epitomized the case law with respect to the existence of an implied Constitutional immunity from taxation as follows:

> The Constitution immunizes the United States and its property from taxation by the States, [citation] but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States. [Citations.] [378 U.S. at 44.]

Petitioners seek to distinguish *United States v. City of Detroit, supra*, by arguing that the California tax has a disastrous impact on the program of leasing Indian lands and lease revenue.[4] Without explaining the contradiction, however, they assert and have in fact imposed, what is reputed to be a tribal possessory interest tax. Suffice it to say that Leonard M. Hill, Area Director for the Bureau of Indian Affairs,[5] and the

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[4]No authority is cited for the assumption implicit in petitioners brief that they are entitled as a matter of law to a rate of return on trust lands in excess of that paid for similar non-Indian land.

[5]Mr. Hill stated: "I think after the first shock, after it was generally known that the County was assessing the tax, that the impact on the development was not particularly negative. . . ." [T. 31, lines 10-13], and "I think in recent years or the last two or three years I do not think that the imposition of a tax necessarily has slowed up the development on the leases that have been negotiated since everyone knew that the imposition would be made." [T. 31, line 22, to T. 32, line 1.]

Department of the Interior's Palm Springs Task Force do not see the impact on the lease program that Petitioners find. Neither was there any evidence to indicate that the possessory interest tax results in the Indian lessor receiving less than the market established rental rate of return. [T. 273, lines 6-15.]

The argument that a non-discriminatory property tax assessed against a third person, could as a matter of law ever be considered more than a theoretical burden on a tax-exempt entity has been previously rejected by this Court. *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1 (1937); *Choctaw, O. & G. R. Co. v. Mackey*, 256 U.S. 531, 535-537 (1921); *Gromet v. Standard Dredging Co.*, 224 U.S. 362 (1912); *Central P. R. Co. v. California*, 162 U.S. 91 (1896); *Thomson v. Union P. R. Co.*, 9 Wall. (U.S.) 579 (1870). As stated in *Union P. R. Co. v. Peniston*, 18 Wall. (U.S.) 5 (1873):

> It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform . . . [18 Wall. (U.S.) at 36-37.]

The Petitioners' position, in essence, seeks to resurrect the old "economic burden" test for tax exemp-

tion, that the Federal Government rejected as "illusory and incapable of consistent application." *United States v. Detroit*, 355 U.S. 466, 473 n.4 (1958).

The various arguments that Petitioners raise in attacking California's possessory interest tax were decided adversely to them in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949). In that action a lessee of mineral rights[6] in Indian trust land was held to be subject to the Oklahoma gross production tax and per barrel excise tax. The gross production tax was levied at the same rate as the property tax rate and was in substance an *ad valorem* property tax under State law, 336 U.S. at 346, and treated as such by this Court, 336 U.S. at 350. The holding of the Court was expressly grounded on its earlier decisions cited in footnote 18 of the opinion that have held that "property owned by a private person and used by him in performing services for the Federal Government is subject to state and local *ad valorem* taxes." 336 U.S. at 350.

Arguments that taxation of the non-Indian lessee's property violate the trust obligation of the Federal Government to convey the land "free of all charge or incumbrance whatsoever" at the end of the trust period beg the question. They assume that the non-Indian lessee's estate is also subject to the trust provisions. This is not the law. In holding the interest of a non-Indian in Indian trust land subject to *ad valorem* taxation,

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[6]As in the present action the lease was subject to regulations of the Secretary of the Interior. 336 U.S. at 345. These regulations are more restrictive than those applicable to the leases in the present action. Compare 30 C.F.R. §§221.1-221.67 with 25 C.F.R. §§131.1-131.19.

this Court in *Bailess v. Paukune,* 344 U.S. 171 (1952) stated:

> *Levindale Lead Co. v. Coleman,* 241 U.S. 432 dealt with restrictions on alienation attached to land under the Osage Indian Allotment Act of June 28, 1906, 35 Stat. 539. The Court held that the policy of that Act did not embrace persons who were not Indians, since the Congress sought to protect only those toward whom it owed the duties of a guardian. The same answer must be given here. If Juana is not an Indian, the United States has no interest of hers in the land to protect. True, the United States holds the legal title to the land. But nothing in the act prevents the devolution of the equiable interest to the widow. If she is not within the class who Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely, the issuance of a fee patent to the *cestui.* [344 U.S. at 173. Footnotes omitted.]

Similarly, this Court in *Fink v. County Commissioners of Muskogee County,* 248 U.S. 399 (1919), held that the exemption from *ad valorem* property taxes of Indian trust land, does not run with the land so as to exempt it from taxation in the hands of a non-Indian purchaser.[7] There is nothing in the Mission Indian Relief Act that indicates that Congress intended that non-Indians living off the reservation pay the costs of schools, roads, courts, police protection and all the other benefits of an ordered society for the non-Indian lessee as well as the Indian. In fact, as originally enacted, leasing of the land was forbidden—the property being "for the sole use and benefit" of the Petitioners.

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[7]To the same effect is *Sweet v. Schock,* 245 U.S. 192 (1917).

Contrary to Petitioners' argument, the commerce clause of the Constitution (art. I, §8, cl. 3) is not a bar to the California tax. State taxation of non-Indian property on Indian land has long ago been held not to impose an illegal burden or regulation of commerce with the Indian. *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264, 274-275 (1898). Petitioners' argument that the California possessory interest tax violates the commerce clause because it hampers the United States in making the best lease terms for its Indian wards, while at one time used by this Court to strike down a State income tax on a non-Indian lessee's income from Indian trust property, is untenable today and without authority. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922).

Congressional authorization for the California possessory interest tax, if such is indeed necessary, is contained in 28 U.S.C. §1360, that extended to all Indian country in California "those civil laws of such State . . . that are of general application to private persons or private property" and provides that such civil laws "shall have the same force and effect within the State. . . ."[8] Section 107 of the California Revenue and Taxation Code is certainly a civil law of general application to private property within the State of California. The leasehold estate of the non-Indian lessee, being a separate and distinct property interest from that of the

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[8]A discussion of the scope of the jurisdictional grant of Public Law 280 (18 U.S.C. §1162; 28 U.S.C. §1360) is contained in *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962).

Federal Government or the Indian,[9] and not subject to the trust provisions, is not exempted from taxation by the provisions of 28 U.S.C. §1360(b). Subsection (b) provides that "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States. . . ."

The burden is clearly on Petitioners to persuade Congress, if they feel it necessary, to enact legislation creating a tax exemption for their commercial lessees.

> This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering*, 307 U.S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "If the exemption had been intended, it would doubtless have been expressed." *Cherokee Tobacco*, 11 Wall. 616, 620. [*Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943).]

Congress is certainly aware of the existence of the application of the possessory interest tax to non-Indian lessees Such a tax was first upheld against a non-Indian leasehold estate in Indian trust land in *United States v. Erie County*, 31 F.Supp. 57 (W.D.N.Y. 1939), and its use was suggested by Congressman Utt during hearings before Congressman Haley's subcommittee in 1957. *Hearings Before the Special Subcommittee on Equalization on Land Allotments on the Agua Caliente Reservation in California of the House Committee on Interior and Insular Affairs*, 85th Cong., 1st Sess., ser. No. 17 at 41—42 (1957).

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[9] *United States v. Detroit*, 355 U.S. 466 (1958); *People v. Shearer*, 30 Cal. 645, 657 (1866).

II.

Petitioners Have a Plain, Speedy, and Efficient Remedy for Their Alleged Injury in the Courts of California.

The Tax Injunction Act, 28 U.S.C. §1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Policy that led to the enactment of the Tax Injunction Act is stated in *Matthews v. Rodgers*, 284 U.S. 521 (1932):

> . . . The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. [248 U.S. at 525.]

The United States Court of Appeals in reaching its decision on the merits, held that a person who could have been a co-plaintiff with the United States, is entitled to maintain an action in the federal courts contesting a State tax allegedly imposed on a federal instrumentality; 28 U.S.C. §1341 to the contrary notwithstanding.

In so holding the court failed to cite or distinguish its earlier opinion in *Harsh California Corp. v. County of San Bernardino*, 262 F.2d 626 (9th Cir. 1958), that affirmed the dismissal, of an action, pursuant to

28 U.S.C. §1341, to enjoin the collection of possessory interest taxes assessed against the Harsh California Corporation on its lease of tax-exempt land and improvements owned by the United States.

Nor did the court make any mention of *Lasker Boiler and Engineering Corp. v. Hamm*, 216 F.Supp. 74 (M.D. Ala. 1963), aff'd 328 F.2d 429 (5th Cir., 1964) wherein the District Court dismissed an action, pursuant to the Tax Injunction Act, to enjoin a State use tax that allegedly "violated the sovereign immunity of the United States and subjects plaintiff, as an official agency of the United States Government, to state tax action without authority therefor. . . ." [216 F. Supp. at 75.]

Merely because an Indian can sue to protect his property rights does not mean that he enjoys the same access to the federal courts as that available to the United States. It is the presence of the United States in an action, not the fact that the United States could have been present because the issue is the alleged taxation of a federal instrumentality, that creates the exception to the jurisdictional bar of 28 U.S.C. §1341.

In *United States v. Livingston*, 179 F.Supp. 9 (E.D. S.C. 1959) aff'd without opinion 394 U.S. 281 (1960), relied upon by the Court of Appeals in excepting petitioners from the operation of 28 U.S.C. §1341, the court specifically determined that the United States was not just a nominal party in that action but was in fact suing to defend its own sovereign immunity. The opinion of the court also touches on what is the real basis for exempting the United States from 28 U.S.C. §1341 in the absence of a clear and explicit expression of Congress to the contrary:

> There appears no good reason why the Congress should deny the United States the protection of the equitable powers of her own courts in a situation such as that with which we are now concerned, . . . [179 F.Supp. at 11.]

The discussion by this Court in *Department of Employment v. United States*, 385 U.S. 355 (1966), on the application of the Tax Injunction Act to suits brought by the United States, and the authorities cited at footnotes 6 and 7 of the opinion, also indicate that it is the presence of the United States in the action, and not the fact that a tax is alleged to be imposed on a federal instrumentality, that creates the exception to 28 U.S.C. §1341.

> . . . For we conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that §1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. . . . [385 U.S. at 358. Footnotes omitted.]

There are numerous remedies Petitioners could have sought under California law, had they brought the present action in the State courts. These remedies are: an action in mandamus to compel the Assessor to allow the claimed property tax exemption, *Eisley v. Mohan*, 31 Cal.2d 637, 192 P.2d 5 (1948); *Lockhart v. Wolden*, 17 Cal.2d 628, 211 P.2d 319 (1941); an action to enjoin the assessment, levy and collection of the tax, *Universal Consolidated Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746 (1944); *Lockheed Aircraft Corporation v. County of Los Angeles*, 207 Cal.App. 2d 119, 24 Cal.Rptr. 316 (1962); and an action for

a declaration of the validity of the tax, *Montgomery Ward & Co. v. Welch*, 17 Cal.App.2d 127, 61 P.2d 790 (1936).

The fact that the Petitioners are not liable for payment of the taxes of which they complain would not prevent them from seeking relief in the California courts. In *Department of Veterans Affairs v. Board of Supervisors*, 31 Cal.2d 657, 192 P.2d 22 (1948), a tax exempt agency of the State sought a writ of mandate to establish a tax exemption for real property in which it held a lien interest. The agency was not alleged to be liable for the taxes assessed. The court denied relief, not upon the ground that procedurally the agency could not bring the action, but because the agency was not entitled to a cancellation of taxes under California law where its property interest at the time it sought cancellation was merely that of a secured creditor.

Had Petitioners been the assessees of the possessory interest tax, the statutory remedies of payment under protest and suit for recovery of the taxes [California Revenue and Taxation Code §§5136-5143] and petition for refund and suit [California Revenue and Taxation Code §§5096-5107] would be available as well as resistance to an action by the respondent to collect the tax. *Harsh California Corp. v. County of San Bernardino*, 262 F.2d 626 (9th Cir. 1958). Indeed, it is the very lack of availability of these statutory remedies to Petitioners that permits them to seek the equitable remedies. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102 (1906); *Jillson v. Sacramento County*, 221 Cal.App.2d 192, 34 Cal.Rptr. 419 (1963). At least one text writer has recognized that in a situation similar to that of the Petitioners, injunctive and declaratory relief would be available:

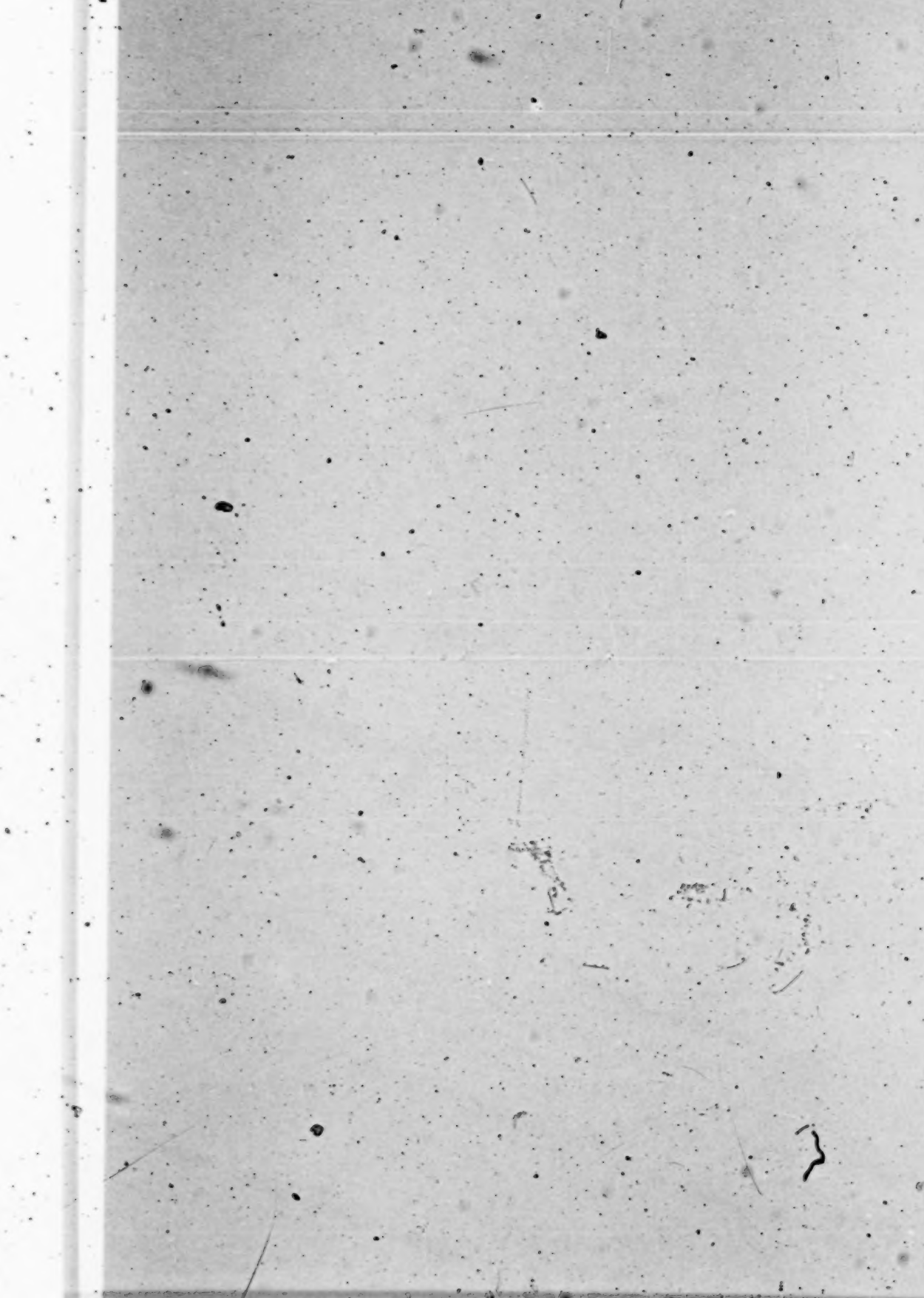
". . . One possible use of the action for declaratory relief or injunction might be the situation where a tenant has paid the tax pursuant to agreement with the landlord and where the owner cannot sue to recover the taxes, he not having paid them." [Marshall, State and Local Taxation (11 California Practice, 1969) at 174. Footnotes omitted.]

Conclusion.

Petitioners' petition for Writ of Certiorari fails to raise any of the special or important reasons for granting a review listed in Rule 19(1)(b) of the Rules of the Supreme Court of the United States and accordingly should be denied.

RAY T. SULLIVAN, JR.,
County Counsel,
County of Riverside,

STEVEN A. BROILES,
Deputy County Counsel,
Attorneys for Respondent.



APPENDIX A.

United States Code, Title 28.

§1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian Country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

United States Code, Title 28.

§1341. Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Mission Indian Relief Act.

Act of January 12, 1891, c. 65, 26 Stat. 712

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years,

in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Depart-

ment, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Intrior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservations, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the

same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

Sec. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants; it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians passed by the legislature of the State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

Sec. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge

of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury and not otherwise appropriated.

Sec. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided,* That any individual, firm or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulation as said Secretary may require as a condition precedent to the granting of such authority: *And provided further,* That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been

granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

California Revenue and Taxation Code.

§107 "Possessory Interests."

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land. Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 and 2919, inclusive, at any time within the three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.

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No. 71-183

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE AGUA CALIENTE BAND OF MISSION INDIANS, ET AL., PETITIONERS

v.

THE COUNTY OF RIVERSIDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of October 12, 1971, inviting the Solicitor General to express the views of the United States in this case.

1. The petitioners in this case are the tribal council of the Agua Caliente Band of Mission Indians and allottees of the tribal lands individually and on be-

half of all allottees. All of the lands in question are part of the Agua Caliente Reservation established by the Mission Indian Relief Act of 1891, 26 Stat. 712, and the Executive Order of President Taft, January 5, 1911, allocating land to the Agua Caliente Tribe (Pet. 2, 3, App. A).[1] The allotments were made under the combined authority of the Mission Indian Relief Act and of the General Allotment Act of 1887, as amended by the Act of June 25, 1910, 36 Stat. 859, 25 U.S.C. 331 *et seq.*[2] This Court had occasion to consider the laws establishing this reservation and the rights of individual members of the Tribe to allotments in *Arenas* v. *United States*, 322 U. S. 419, 420-425. See also the decision on remand, 158 F.2d 730 (C.A. 9).

All of the unallotted land is, under the Relief Act and the executive order, held by the United States "in trust, for the sole use and benefit of the band or village to which it is issued" under the charge to return the land to the beneficiaries "discharged of said trust, and free of all charge or incumbrance whatsoever" (Relief Act, Sec. 3, Executive Order Pet. App. A).

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[1] The parties have stipulated that the lands are part of a Reservation established by Executive Order (Tr. 36). "Tr." refers to the transcript of the proceedings in the district court.

[2] By Act of March 2, 1917, 39 Stat. 969, 976, Congress "authorized and directed" the Secretary of the Interior to proceed with the allotment of the Agua Caliente Lands under the General Allotment Act as amended. *Arenas* v. *United States*, 322 U.S. 419, 421. See also Tr. 172-173.

Although individual allotments have been made, none of the allottees have received title in fee and the alloted lands remain part of the reservation and in trust under language identical in all material respects to the language of the original trust (Tr. 21-23; 25 U.S.C. 348).

2. No claim has been made by respondents that the land itself, as opposed to its use by lessees, is subject to state taxation. Indeed, as to the allotted land, this Court has interpreted identical trust language in combination, as here, with the language of the General Allotment Act as conferring a statutory tax exemption. *Squire* v. *Capoeman*, 351 U. S. 1. In that case the treaty required the government at the end of the trust to transfer the fee "free of all charge or incumbrance whatsoever." *Id.* at 6. This Court noted "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.* at 7. The Court concluded that the proviso in the General Allotment Act (25 U.S.C. 349) allowing taxation after a grant of fee ownership constitutes a "congressional exemption from tax" until fee ownership is granted (351 U. S. at 10).

As to unallotted tribal lands, immunity from state taxation was established in *The Kansas Indians*, 5 Wall. 737, and *The New York Indians*, 5 Wall. 761. In *The Kansas Indians*, this Court stated (at 756) " 'but until they are clothed with the rights and bound to all the duties of citizens', they enjoy the privilege of total immunity from State Taxation." Though this immunity may no longer be total, tribal lands them-

selves are still immune from state taxation in the absence of a federal statute removing the immunity. See *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 366-367.[3] As a corollary, the Indians themselves have a limited right of self-government within the reservation, including the power to tax. See *Buster* v. *Wright*, 135 Fed. 947 (C.A. 8); Tr. 184-186. The limitation on State taxation within reservations is summarized by Cohen as follows:[4]

> "* * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found. * * *"

In 1953, Congress extended to the States certain civil and criminal jurisdiction over Indian tribes but stated specifically that nothing in the conferral of

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[3] See also Cohen, *Federal Indian Law*, 2d Edition 1958, published under the supervision of the Solicitor of the Department of the Interior, at 850: "Lands which are occupied by a tribe or tribes of Indians have always been regarded as not within the jurisdiction of the State for purposes of State property taxation."

[4] Cohen, *supra*, at 845-846, citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651. This is in contrast to federal taxation in which tax coverage is assumed unless a particular exemption can be found. See *Squire* v. *Capoeman*, *supra*.

jurisdiction "shall authorize the alienation, encumbrance, or taxation of any real or personal property * * * belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States".[5]

3. Although the issue arises in the present case in a novel setting, the problem is one which has been settled by decisions of this Court. When legal questions are close and difficult, it is understandable that efforts should be made to raise them anew. And there are times when even questions which have been settled for a long time should be subject to reexamination. This does not appear to be such a case.

4. Beginning with *McCulloch* v. *Maryland*, 4 Wheaton 316, and through *Collector* v. *Day*, 11 Wall. 113, there developed an extensive law of intergovernmental immunity in the tax field. Though *McCulloch* v. *Maryland* was concerned with a discriminatory tax, *Collector* v. *Day* involved the ordinary income tax applicable to all persons. Consistently with these decisions, the Court decided that Congress could not impose a nondiscriminatory income tax on interest derived from state and municipal bonds (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429), and, under a different principle, that salaries of federal judges could not be subjected to nondiscriminatory federal income tax. *Evans* v. *Gore*, 253 U.S. 245. Numerous other decisions proceeded along these lines.

In particular, the Court applied this approach to Indian lands, held in trust by the United States, on

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[5] 28 U.S.C. 1360(b); 18 U.S.C. 1162.

the ground that these were instrumentalities of the United States, immune from state taxation. Thus, in *Choctaw & Gulf R. R.* v. *Harrison*, 235 U.S. 292, the Court struck down a gross production tax on oil and gas, as applied to a lessee of restricted Indian lands. Then it held that the lessee itself was a federal instrumentality and not subject to state taxation. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522. Then in *Gillespie* v. *Oklahoma*, 257 U.S. 501, a tax upon the net income of the lessee, derived from sale of his share of the oil produced on restricted Indian lands, was also held invalid.

5. This trend began to change some 45 years ago, shortly after the accession of Mr. Justice Stone to the bench. A new approach was exemplified in *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, where it was held that fees paid by a state to an independent contractor were subject to nondiscriminatory federal income tax. This tendency continued, and gathered strength, over the following years. In *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, *Collector* v. *Day* was overruled. And in *O'Malley* v. *Woodrough*, 307 U.S. 277, *Evans* v. *Gore* was overruled.

6. A similar development occurred with respect to taxation of the avails from Indian lands. In 1938, the Court decided *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, in an opinion by Chief Justice Hughes. It held that the federal income tax could constitutionally be applied to income derived by the lessee of state school lands. In reaching this result, *Gillespie* v. *Oklahoma*, was overruled, along with the Court's then re-

cent decision in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393.

It is obvious that the burden of the federal tax involved in the *Mountain Producers* case fell, in considerable measure, on the state. If the lessee had been immune from federal taxation (as this Court had held in *Burnet* v. *Coronado Oil & Gas Co.*), competition would undoubtedly have produced a higher return to the state from the lease. Thus, the basic underlying constitutional question in the present case was determined by this Court more than 30 years ago in the *Mountain Producers* case.

7. There have been further decisions which show that the Court has already decided the question raised here, as the court below concluded. The most significant is *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342. The Court there held that a lessee of mineral rights in restricted Indian lands was not immune under the federal Constitution from nondiscriminatory state gross production taxes, and state excise taxes on petroleum produced from these Indian lands.[6] In reaching this result, the Court said (336 U.S. at 353): "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ulti-

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[6] *Helvering* v. *Mountain Producers Corp.*, *supra*, was found to be controlling, and a considerable line of cases were overruled. These were *Choctaw & Gulf R. R.* v. *Harrison*, 235 U.S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U.S. 503; *Large Oil Co.* v. *Howard*, 248 U.S. 549, and *Oklahoma* v. *Barnsdall Refineries*, 296 U.S. 521.

mate liability for the taxes may fall upon the owner of the land." [7]

8. It is not without significance, we think, that though *Oklahoma Tax Commission* v. *Texas Co.* involved a state tax, an extensive brief *amicus curiae* was filed by the United States, through Solicitor General Perlman, in which it was urged that the power of the state to tax should be upheld, with respect to both constitutional and statutory objections.[8]

With respect to the constitutional question, Solicitor General Perlman urged that "No Constitutional Immunity Exists," on grounds essentially the same as those adopted by the Court (Br. 7-29). Solicitor General Perlman also urged, with respect to statutory provisions essentially the same as those involved here, that "No Statutory Immunity Has Been Created" (Br. 29-40). On this point, the brief quoted this

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[7] It is on this ground that *Squire* v. *Capoeman*, 351 U.S. 1, may perhaps be best explained. In that case, this Court held, on statutory grounds, that the proceeds of sale of timber on Indian lands were not subject to the federal income tax on capital gains. In that case, the government held the land as trustee for Indians and the taxpayers before the Court were "full-blood, noncompetent Quinaielt Indians," 351 U.S. at 3. The Court found that the land "was of little value after the timber was cut" (351 U.S. at 4), and concluded that "imposition of the tax here in question [on the Indians] is inconsistent with the Government's promise to transfer the fee 'free of all charge or incumbrance whatsoever.' " 351 U.S. at 6. In the present case, no tax is imposed on the Indians, and the land owned by the Indians is not subject to any charge or encumbrance.

[8] See Brief for the United States as Amicus Curiae, in *Oklahoma Tax Commission* v. *Texas Co.*, Nos. 40 and 41, October Term, 1948, available in the library of the Court.

Court's statement in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 604, that "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." This Court accepted this contention and concluded that there was no statutory exemption. It said: "Congress' silence prior to the *Mountain Producers* decision did not preclude this Court from curtailing the lessee's immunity in that case; and Congress seems to have accepted that decision with equanimity." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. at 367.

There is no doubt that Congress has the power to exempt lessees of Indian lands from taxes, including the sort of taxes involved in this case. This was recognized in Solicitor General Perlman's brief (Br. 30) and in the Court's opinion (336 U.S. at 365-366). See also *United States* v. *City of Detroit*, 355 U.S. 466, 474-475. But more than 22 years have passed since this Court's decision in *Oklahoma Tax Commission* v. *Texas Co.*, "and Congress seems to have accepted that decision with equanimity."[9] There is no

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[9] Reference may be made to 28 U.S.C. 1360, which was most recently amended in 1958. This provides that "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian, or Indian tribe * * *." This clearly does not grant a tax exemption. It neither adds to, nor subtracts from whatever may otherwise be the state's capacity to tax. Similarly, Public Law 86-339, 73 Stat. 602, 604, Section 5, is inapplicable, since by its terms, it provides exemption only from "inheritance, estate, legacy, or succession taxes."

express exemption of leases in this situation, and no sound basis for implying one.

9. These battles were fought out fully nearly a generation ago. As indicated, the ultimate resolution remains within the power of Congress. It is, of course, true that no decision of this Court stands above this Court's power to reconsider, and the history of the Court shows many instances where old and well-established decisions have been reconsidered and overruled. Cf. *Erie Railroad* v. *Tompkins*, 304 U.S. 64; *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, overruling *The Harrisburg*, 119 U.S. 199. Determining the occasions for such action is one of the highest aspects of the judicial function. This is not such an occasion. Here, the basic question has been determined, in cases such as *Oklahoma Tax Commission* v. *Texas Co.*, *supra*, and *United States* v. *City of Detroit*, 355 U.S. 466. Those decisions were reached in the light of developments which had occurred over a period of more than 20 years. As this Court said, speaking through Mr. Justice Black, in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 610:

> Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, permitted states to impose income taxes upon government employees, and *Helvering* v. *Gerhardt*, 304 U.S. 405, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodrough*, 307 U.S. 277, overruled a previous decision which

held that judges should not pay taxes just as other citizens, and *Helvering* v. *Mountain Producers Corp.*, *supra*, repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, and *James* v. *Dravo Contracting Co.*, 302 U.S. 134. The trend of these cases should not now be reversed.

10. It is surely true that the country has a great responsibility with respect to the Indians. No issue as to the existence of that responsibility is presented by this case.

The question here is simply how the cost of meeting that responsibility shall be shared, recognizing always the overriding power of Congress to make that determination in accordance with its judgment. If the petitioners' contentions here were to prevail, there would probably be some immediate economic gain to the Agua Caliente Indians. This would come at the expense of local taxpayers, the people of Riverside County and the State of California. The lessees here attract guests who use the highways; they have employees whose children use the schools; they present public health problems, and require fire and police protection, all of which come basically as a local charge. There is no reason, either constitutional or statutory, why the lessees here should be immune from bearing their normal, nondiscriminatory share of these costs in the absence of a clear provision to that effect by Congress. The fact that this may have economic impact on the Agua Caliente Indians has been determined by this Court to be without constitutional or

statutory significance, in the *Mountain Producers* and in the *Oklahoma Tax Commission* cases.

If further aid for the Indians is needed this should be a national responsibility, and should be provided by Congress, in whatever way Congress thinks appropriate or desirable. There is no occasion now for this Court to reexamine the conclusions which it has reached in this area, after extensive consideration in *Mountain Producers*, *Oklahoma Tax Commission*, and in many other cases. For, as the Court pointed out in *United States* v. *City of Detroit*, *supra*, 355 U.S. at 474:

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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RESPONSE OF PETITIONERS AGUA CALIENTE BAND OF MISSION INDIANS AND AMICI TO STATEMENT OF GOVERNMENT POSITION

LEWIS & ROCA

By John P. Frank
114 West Adams
Phoenix, Arizona 85003

RAYMOND C. SIMPSON
406 Security Bank Building
Long Beach, California 90802

Counsel for Petitioners

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RESPONSE OF PETITIONERS AGUA CALIENTE BAND OF MISSION INDIANS AND AMICI TO STATEMENT OF GOVERNMENT POSITION

This case involves the taxation of Indian lessees based essentially on the value of the Indian lands they lease. As the record shows, this tax, though in form on the lessees, falls in fact on the Indians and demonstrably either sharply diminishes their leases or wipes out altogether their capacity to utilize their lands by the only means they have.

The issue at this stage is whether this question is important. Noticeably, the Solicitor General does not address himself to this question. He does argue that a given case would require affirmance of this decision if the certiorari were granted. *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 63 S. Ct. 1284, 87

L. Ed. 1612 (1943). This case did not seem this significant to the Court below, which specifically and fairly noted in n. 15, Pet. App. p. 18a, that a later decision of this Court might cast a different light on this decision. *Squire v. Capoeman,* 351 U.S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956). We had our own say on this in our petition. The Solicitor General also argues that the Indians should as a matter of policy bear the weight of these taxes; Memorandum of the United States, p. 11.

All this is immaterial. Concededly, Congress has power to exempt lands from this burden. A key issue is whether it has. The pathetic aspect of this case is the everlasting whipsawing of the Indians. The Solicitor General says that Congress should legislate on this subject if it wishes to protect the Indians in this regard, but in the amicus brief filed here by Representative James A. Haley, Chairman of the Indian Subcommittee of the Interior and Insular Affairs Committee of the House of Representatives since 1955, declares that this has already been done. Such a collision from the Indian standpoint is itself important.

The larger issue remains important. The tragic position of the American Indian in litigation is that the Government speaks for him with some appearance of benign wardship. Such expressions, as here, that Indians should bear this weight of taxation, at least do not express the Indian view. Since the Solicitor General does not address himself to the usual factors of importance, we quote President Nixon in his message of July 8, 1970:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past and to

remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

The Indians of America join the White House in this view; the meaning of trust status is vital to the productive utilization of which the President speaks. This is a matter of the utmost importance to the Indians of America. The impact varies — some tribes lease more than others, or are more dependent on their leases than others. In some cases the blow is particularly devastating; as the record shows, the Fort Mohave Indians are among the most poverty-stricken inhabitants of North America, and their California leasing has been obliterated since the tax.

In urging the importance of this question, the Agua Calientes are joined by over 100 tribes of the Indians of America. Whether California can breach the promise to the trust hope is an important question, worthy of consideration here.

Respectfully submitted,

LEWIS & ROCA

By John P. Frank

RAYMOND C. SIMPSON
Counsel for Petitioners

January, 1972

AMICUS TRIBES

Ahtna Tanah Ninnah Associates
Alaskan Federation of Natives
Akiak Village
Anvik City Counsel
Black Feet Tribe
Big Pine Indian Tribe
Tlingit Haida Indian Tribe
Cabazon Band of Mission Indians
Chemhuevi Indian Tribe
Cherokee Nation of Oklahoma
Cheyenne River Sioux Tribe
Chippewa Cree Tribe
Choctaw Tribe of Mississippi
Coeur de 'Alene Tribe
Colorado River Indian Tribes
Confederated Tribes of the Colville Reservation
Salish and Kootenai Tribes
Cook Inlet Native Association
Cowlitz Tribe
Creek Sioux Tribe
Duckwater Shoshone Tribe
Fairbanks Native Association
Fort Hall Shoshone Bannock Tribe
Fort McDermitt Piaute Tribe
Fort Mohave Indian Tribe of Arizona, California and Nevada
Fort Peck Assini Boine Sioux Tribe
Fort Yukon Native Association
Grand Portage Indian Tribe
Gila River Pima-Maricopa Tribe
Haida Tribe
Hailla Indian Tribe
Hoopa Valley Tribe
Kalistel Indian Tribe

Keweenaw Bay Indian Tribe
Kalamath River Tribe
Lac Du Slambeau Band of Lake Superior Chippewa Indians
Leach Lake Tribe of Minnesota
Lower Brule Sioux Tribe
Lummi Tribe of Washington
Makah Indian Tribe
Mescalero Apache Tribe
Metlakatla Indian Tribe
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Minnesota Chippewa Tribe
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Native Village of Eklutna
Nenana Native Association
Omaha Tribe of Indians
Oneida Tribe of Indians
Ottawa Indian Tribe
Papago Tribe
Peoria Indian Tribe
Pict River Indian Tribe
Puyallup Tribe
Pyramid Lake Piaute Tribe
Quileute Tribe
Quapaw Indian Tribe
Quinalt Nation
Red Cliff Band of Lake Superior Chippewa Indians
Rincon Band of Indians
Sac and Fox Intertribe of Oklahoma
Salt River Pima-Maricopa Indian Tribe
Sauk-Suiattle Tribe
Seminole Tribe of Florida
Seneca Nation of Indians
Shoalwater Tribe

Shoshone Piaute Tribe
Shoshone Bannock Tribe
Sisseton Wahpeton Sioux
Skokomish Tribe
Snohomish Tribe
Southern Ute Tribe
Reno Sparks Tribe
Spokane Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Stockbridge Munsee Indian Tribe
Susanville Indian Tribe
Swinomish Tribe
Tanna Chies's Conference
Three Affiliated Tribes
Taos Pueblo Tribe
The Tulalip Tribe
Tunica Indian Tribe
Unal Aklett Tribe
Uintah and Ouray Tribes
Walker River Piaute Tribe
Washone Tribe
Winnebago Tribe of Nebraska
Yakima Tribe
Yaqui Tribe
Yavapai Apache Indian Tribe
Fort Belknap Council Tribe
Quechan Indian Tribes of the Fort Yuma Reservation of Arizona and California
Native American Rights Fund
California Indian Legal Services
Dinebeiina Nahiilna Be Agaditahe
Association on American Indian Affairs, Inc.
The San Carlos Apache Tribe

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-183

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

v.

THE COUNTY OF RIVERSIDE, a Political Subdivision of the STATE OF CALIFORNIA,

Respondents.

REPLY OF NATIVE AMERICAN RIGHTS FUND, CALIFORNIA INDIAN LEGAL SERVICES, DINEBEIINA NAHIILNA BE AGADITAHE, AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICI CURIAE TO MEMORANDUM FOR THE UNITED STATES

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae
Association on American Indian Affairs, Inc.

DAVID H. GETCHES
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Attorney for Amici Curiae
Native American Rights Fund
California Indian Legal Services
Dinebeiina Nahiilna Be Agaditahe

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In concluding that the basic question raised in this case has already been decided by this Court, the Solicitor General relies on a series of cases decided twenty to thirty years ago. Taken together, these cases stand for one basic proposition: that federal and state "instrumentalities" are not, by virtue of that status alone, immune from taxation by the other sovereign. This proposition does not control in this case.

The Solicitor General almost completely overlooks a more recent series of cases striking out in a different direction. Typical of these cases is *Squire v. Capoeman*, 351 U.S. 1 (1956), with which the Solicitor General grapples so unsuccessfully. Memorandum for United States as *Amicus Curiae*, p. 8, n. 7. *Squire*, along with *Williams v. Lee*, 358 U.S. 217 (1959), *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961), and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), strike down federal and state taxes, and other state efforts infringing on the activities of federal instrumentalities, when the taxes and other state efforts are inconsistent with the underlying purposes of the instrumentality, or of the policies pursuant to which the instrumentality is acting.

Thus, in *Squire* this Court held that the proceeds of the sale of timber on Indian lands were not subject to the federal income tax on capital gains because "it is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking" in causing the Indian lands to be allotted. 351 U.S. at 10. In *Federal Land Bank*, the Court assessed the validity of a state tax on mineral rights held by the federal instrumentality in light of its effect on the Congressional objective in establishing the Federal Land Bank. Since the federal goal was dependent upon maximization of the Bank's profits and since the tax reduced these profits, the state tax was held invalid. *Compare United States v. Detroit*, 355 U.S. 466 (1958), in which the achievement of the principal federal objective, the use of the government's physical plant for industrial purposes, was not at all inconsistent with the levy of a possessory interest tax on the government's lessee.

In *Warren Trading Post*, conspicuous by its absence from the Solicitor General's Memorandum, this Court voided a state sales tax levied against sales of a retail trading business on an Indian reservation because of the possible adverse effects of the tax on the comprehensive federal policy regu-

lating traders on reservations.[1] In *Warren Trading Post*, unlike this case, there was no act of Congress that even arguably granted immunity from the state tax. And in *Williams v. Lee*, this Court held that Arizona courts did *not* have jurisdiction of a civil suit against reservation Indians for goods sold to them by a non-Indian operating a store on the reservation because the existence of state court jurisdiction would interfere with the dominant federal policy of encouraging reservation Indians to make their own laws and be ruled by them.[2]

In this sense, this Court's reasoning in *United States v. Rickert*, 188 U.S. 432 (1903) is still valid today. *Rickert* held that the state could not tax either an Indian's permament improvements on an allotment or his personal property (such as cattle and horses) issued by the United States because the effect of permitting the tax would be to defeat the basic purposes of federal Indian policy. *See generally* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. Rev. 1261 (1971).

As we have shown in our *amicus* briefs in support of the petition for certiorari, economic development of

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[1] In the *Warren Trading Post* opinion, this Court pointed out that the federal government pays for most of the services needed by the Indians which the state provides for other citizens (380 U.S. at 690-691), thus effectively answering the Solicitor General's fears that a ruling in the petitioners' favor would unfairly burden local taxpayers. In addition, we wish to point out the obvious: that property taxes are only one form of revenue generated by the states and their political subdivisions, that Indians and their lessees pay other forms of state taxes. Furthermore, state coffers are substantially enriched by the income and sales generated by Indian lessees. These are precisely the kind of equities that Congress is best equipped to evaluate (*see infra*, pp. 5-6).

[2] As in *Williams v. Lee*, the action of the state here has the effect of interfering with an essential aspect of tribal self-government: the power of the tribe to tax lessees. See our *amicus* briefs in support of the petition.

Indian reservations, leading to economic self-sufficiency, is the major federal Indian program today. As both courts below specifically found, application of the county's possessory interest tax to lessees of Indian land would hinder this program. Not only would the tax have the obvious effect of reducing rental income to the Indian lessors, it might often determine whether development takes place on or off the reservation (Tr. 80).

The consequences of the tax here are much more harmful to a more important and widespread federal program than that which was involved in *Warren Trading Post*. This tax should be held invalid not just because it is levied against a federal instrumentality, but because it is inconsistent with the federal government's program to encourage and promote the economic development of Indian lands.

The Solicitor General recognizes, as do we, the paramount power of Congress to legislate the ultimate answer to the issue presented here. The question for this Court is what is to be done in the absence of a clear and specific Congressional directive. It is true that in *United States v. Detroit, supra*, this Court let stand a possessory interest tax levied against a lessee of the government, leaving it up to Congress to change that result if it so desired. However, the opposite rule applies to the state-Indian relationship. As stated by Mr. Justice Black for a unanimous court in *Williams v. Lee, supra*,

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it. 358 U.S. at 223.

In fact, Congress has acted to make certain state imposed taxes applicable to Indian property. *See, e.g.*, 25 U.S.C. §398c and the Brown-Stephens Act, Public Law 291 of December 30, 1916, 39 Stat. 865, held constitutional in *All-*

baugh v. United States, 184 F.2d 109 (8th Cir. 1950), cert. den., 340 U.S. 905 (1950).[3]

If the unique situation of the Agua Caliente Indians makes it equitable for the County of Riverside to levy a possessory interest tax, Congress can and should rectify the situation. Only Congress is equipped to take into account the major differences among the nation's Indian reservations and their special relationships to the states and counties within whose boundaries they lie. Courts should not legislate a solution that would seriously undermine a vitally important federal program on Indian reservations throughout the country at the expense of the nation's most economically deprived minority group.

We respectfully suggest that the Solicitor General is seeking to dispose of this case on the basis of outdated, thirty year old precedents when all of the cases decided by this Court within the past fifteen years indicate that the result here is, at a minimum, very much in doubt. We respectfully submit that certiorari should be granted, if for no other reason than to clarify and reconcile these two lines of cases.

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae
Association on American Indian Affairs, Inc.

DAVID H. GETCHES
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Attorney for Amici Curiae
Native American Rights Fund
California Indian Legal Services
Dinebeiina Nahiilna Be Agaditahe

[3] The very existence of these statutes, one of which, 25 U.S.C. § 398c, expressly authorizes a state possessory interest tax on oil and gas lessees of certain Indian lands, indicates that Congress operates on the assumption that its specific approval is required before any interests in Indian land can be taxed.

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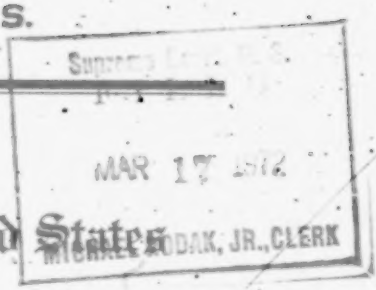

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~71-783~~ 71-183

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v.

THE COUNTY OF RIVERSIDE, a Political Subdivision of the STATE OF CALIFORNIA, *Respondents.*

Petition for Rehearing of Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

LEWIS & ROCA
By JOHN P. FRANK
114 West Adams
Phoenix, Arizona 85003
RAYMOND C. SIMPSON
406 Security Bank Building
Long Beach, California 90802
Counsel for Petitioners

March 17, 1972

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Petition for Rehearing of Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This case involves the validity of a California possessory interest tax as applied to trust lands leased by Indian tribes or individual Indians. The Ninth Circuit Court of Appeals upheld the tax by a two-to-one vote

and this Court denied certiorari, Justices Douglas, Brennan, and Marshall dissenting on February 22, 1972. We now petition for rehearing on the denial of certiorari. The Court denied our petition after first inviting the Office of the Solicitor General to express the views of the United States, which were negative. In a recent case, *Mescalero Apache Tribe* v. *Jones*, No. 71-738, the Solicitor General has now supported a petition for certiorari in an Indian tax case. In *Mescalero* the issue was a tax on revenue and property utilized by the tribe in conjunction with its operation of land leased from the United States Government, being taxed by the State of New Mexico.

We appreciate that the two cases can be, if one is determined to do so, distinguished technically, but they cannot be distinguished functionally. The issue of importance in *Mescalero* as advanced by the Solicitor General is that, "the question of State authority in this area is of national importance because of the serious detrimental effect such taxes can have on the economic well being of Indian tribes and on major federal programs intended to encourage Indian economic development. The decision below, we submit, upholds an unauthorized extension of state jurisdiction to tax which would unwarrantably interfere with these federal programs, and review by this Court is therefore appropriate."

If we may make bold to say so, this is approximately 400 times more true in the *Agua Caliente* case than in the *Mescalero* case. *Mescalero* involves a tax on Indian operations of a money-making project on land leased from the Government. This is comparatively rare. In *Agua Caliente*, the issue was the effect of state taxes for the land under lease belonging either to the tribes or

the Indians themselves. Most, if not all, of the 400 or so tribes or their members in the United States have land in the same category as the *Agua Caliente's*. Our most recent statement represented more than 100 tribes.

CONCLUSION

We have no doubt that certiorari should be granted in the *Mescalero* case. At the same time we respectfully submit that the Order Denying the Petition for Certiorari in *Agua Caliente* should be vacated and that it should be set for briefing and argument too so that the Court may determine the permissible limits of state taxation on programs for Indian economic survival.

LEWIS & ROCA

By JOHN P. FRANK

RAYMOND C. SIMPSON

Counsel for Petitioners

March 17, 1972

Certificate of Counsel

As counsel for petitioners, I hearby certify that this petition for rehearing is presented in good faith and not for delay.

JOHN P. FRANK

Counsel for Petitioners

APPENDIX A

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C. 20515

March 14, 1972

JAMES A. HALEY
7TH DIST., FLORIDA

Washington Address:
ROOM 1236 LONGWORTH BUILDING

Home Address:
P.O. BOX 1053
SARASOTA, FLORIDA

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
CHAIRMAN, SUBCOMMITTEE ON INDIAN AFFAIRS
MEMBER, SUBCOMMITTEE ON IRRIGATION AND RECLAMATION
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Washington Staff:
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MRS. MARILEE B. MACNICHOL
RIVERVIEW, FLORIDA

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BARTOW, FLORIDA
R. ELMO HOOD
FORT MYERS, FLORIDA
MRS. BURNETT BLOODWORTH

Mr. Ray Leonard Patencio, Chairman
Agua Caliente Band of Mission Indians
587 South Palm Canyon Drive
Palm Springs, California 92262

Dear Mr. Patencio:

As Chairman of the Indian Subcommittee for the House of Representatives, I was extremely distressed to learn that your petition for certiorari in the case of ACBMI vs. The County of Riverside was denied. This is indeed a devastating blow to the economic interest of Indians throughout our country, which will undoubtedly cause many to again say that "the white man speaks with a forked tongue".

The President of the United States without equivocation told our Congress that the economic plight of the American

Indian cannot any longer be ignored inasmuch as it is, "a problem of staggering magnitude." It is therefore extremely difficult for the Congress to understand why the Solicitor General saw fit to urge the Supreme Court to deny your petition for certiorari.

The Solicitor General contended that the law in the matter was settled nearly 30 years ago, and adds that if Congress wishes to change it at this time to conform with the position asserted by the Indians, that the problem is for Congress and not for the Courts. We in the Congress who are dealing with the Indian problems agree with the Solicitor General that the law has been settled for quite some time, but firmly believe that it sustains the contentions being made by the Indians.

Congress felt that the Indians already enjoyed this immunity and if we are wrong, we now want to know so that we can initiate appropriate legislation to advance the cause of the Indians. Without the Supreme Court granting the Indian the right to be heard, the Congress is rendered impotent because we do not know what additional legislation, if any, would be required.

If you should decide to file a petition for reconsideration, please let the Court know that I have been Chairman of the Indian Subcommittee for the House of Representatives since 1955 and that by reason thereof, I know this is a critical issue for all of the reservation Indians in the United States, and that I am therefore firm in my convictions that you are entitled to a declaration of your rights by the United States Supreme Court.

Sincerely yours,

/s/ JAMES A. HALEY
James A. Haley
Chairman
Subcommittee of Indian Affairs

CERTIORARI DENIED N.C.R.